

PROSECUTING CREDITORS AND PROTECTING CONSUMERS: CRACKING DOWN ON CREDITORS THAT EXTORT VIA DEBT CRIMINALIZATION PRACTICES

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I INTRODUCTION

Searching online for the words “consumer,” “arrested,” and “debtor’s prison,” reveals numerous news stories about individuals who have been arrested over unpaid credit card debt, payday loans, and other consumer debts. For instance, Joy Uhlmeier, while driving home to Richland, Minnesota, was arrested during a traffic stop and spent sixteen hours in jail before discovering that her arrest stemmed from unpaid credit card debt.¹ Christina McHan, a Texas resident, was arrested and spent a night in jail after Cash Biz filed a criminal complaint against her for defaulting on a \$200 payday loan.² Similarly, Antonio Walker was arrested during a traffic stop in Norfolk, Virginia.³ In a criminal complaint filed against him, Colortyme claimed that Mr. Walker had failed to return a dinette set after defaulting on his rent-to-own (RTO) payments.⁴ Even

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1. See Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIB. (Mar. 17, 2011, 4:40 PM), <http://www.startribune.com/in-jail-for-being-in-debt/95692619> [<https://perma.cc/7GK5-BFJV>] (reporting that “after 16 hours in limbo, jail officials fingerprinted Uhlmeier and explained her offense—missing a court hearing over an unpaid debt” and quoting her as saying “[t]hey have no right to do this to me . . . [n]ot for a stupid credit card”).

2. See, e.g., Forrest Wilder, *Fast Cash: How Taking Out a Payday Loan Could Land You in Jail*, TEX. OBSERVER (July 16, 2013, 11:49 AM), <https://www.texasobserver.org/cash-fast-how-taking-out-a-payday-loan-could-land-you-in-jail/> [<https://perma.cc/GTP9-M2LZ>].

3. Louis Hansen, *Criminal Prosecutions Soar in Rent-To-Own Sector*, VIRGINIAN-PILOT (Apr. 11, 2011), <http://hamptonroads.com/2011/04/criminal-prosecutions-soar-renttoown-sector> [<https://perma.cc/QVZ6-V5L3>]. Colortyme is now a wholly-owned subsidiary of Rent-A-Center, the largest RTO company in the United States. Michael H. Anderson, *An Economic Perspective on Subprime Lending*, 89 CHI.-KENT L. REV. 53, 56 (2013).

4. Anderson, *supra* note 3, at 56.

though the criminal charges were later dropped, his boss, the driver during that fateful traffic stop, fired Mr. Walker.⁵

This article describes the pervasive problem of companies and lenders resorting to practices that criminalize consumers who default on payments of civil debts. Such practices criminalize consumers by inducing terror in consumers of being arrested for or charged with a crime related to their unpaid debts. Though creditors contend they are merely engaged in debt collection, this article asserts that such practices amount to extortion when they incite fear in consumers to get them to pay past-due debts or relinquish ownership of assets.⁶

This article describes three types of criminalization practices: (1) threatening to pursue prosecution of consumers for committing a crime; (2) filing police reports to initiate criminal charges against consumers; and (3) misusing civil contempt to obtain arrest warrants against consumers. Part II provides examples of creditors that criminalize consumers by terrorizing them with threats that conjure up images of their immediate arrest for theft-related crimes. For example, in an enforcement action filed against a subprime auto lender and a car title lender,⁷ the Consumer Financial Protection Bureau (CFPB) alleged that these lenders made threats to have consumers immediately arrested by using Skip Tracy, a telephone spoofing technology that caused caller identification devices to make it appear that the threatening calls were coming from various investigation departments.⁸ Because creditors are using such threats to coerce consumers into paying out of fear of being arrested, these threats constitute

5. Hansen, *supra* note 3.

6. Every state has a statute making certain conduct constitute the crime of extortion or coercion. Richard W. Smith, Note, *Interpreting the Constitution From Inside the Jury Box: Affecting Interstate Commerce as an Element of the Crime*, 55 WASH. & LEE L. REV. 615, 625 n.62 (1998). For example, in California, “[t]here are four types of threats that would induce fear for purposes of the extortion statute: (1) a threat of an unlawful injury to the person or property of the victim or to a third person; (2) a threat to accuse the victim or any relative or family member of any crime; (3) a threat to expose or to impute to the victim any deformity, disgrace, or crime; or (4) a threat to expose any secret affecting the victim or his or her family.” RUTTER GROUP-CAL. CRIM. L. § 8:83 (2016–2017 ed.).

7. A car title loan is secured by the consumer’s paid-off vehicle, and it typically carries a triple-digit interest rate and requires a single balloon payment due usually in 30 days or less. See Creola Johnson, *Creditors’ Use of Consumer Debt Criminalization Practices and Their Financial Abuse of Women*, 34 COLUM. J. GENDER & L. 5, 47–49 (2016) (discussing criminalization tactics used against a single mother who was forced to turn over possession of her car to the lender’s repossession agent and arguing that such tactics were not only unlawful but constituted abuse).

8. See Westlake Services, LLC & Wilshire Consumer Credit, LLC 2015-CFPB-0026 (2015) [hereinafter Westlake Consent Order] (consent order) (“‘Skip Tracy’ means a web-based, multimedia, third-party paid service that allows users to place outgoing calls and choose (a) the phone number from which the calls will appear to have originated; and (b) particular text that may appear on call recipients’ phones as Caller ID. If a call recipient returns a call to one of these phone numbers, Skip Tracy shows the user the Caller ID text associated with the original outgoing call”). The lenders settled the case by agreeing to pay \$48.3 million, of which \$44.1 million will be paid as restitution and loan reductions to affected consumers. See *CFPB Hits Auto Lender with \$48.3M in Fines, Restitution*, AM. BANKER (Oct. 2, 2015, 4:19 PM), <https://www.americanbanker.com/news/cfpb-hits-auto-lender-with-483m-in-fines-restitution> [https://perma.cc/MD5F-NBME].

extortion. Therefore, creditors should be criminally prosecuted for making them.⁹

Part II transitions from describing creditors that only make threats to have consumers arrested to describing creditors that employ the second form of criminalization—filing police reports or complaints to get law enforcement to charge consumers with crimes. Ms. McHan and Mr. Walker were victims of this form of consumer debt criminalization.¹⁰ Although a creditor may claim it has the right to file criminal charges, such a filing constitutes extortion when it accuses the consumer of a crime in order to induce the consumer to either pay the debt or relinquish ownership of assets.

Part III of this article describes how some creditors, instead of filing police reports against consumers directly, misuse the civil contempt process as a back door into the criminal justice system to have consumers arrested for failing to pay civil debts. Chase Bank sued Ms. Uhlmeier for defaulting on her credit card payments to the company. After obtaining a default judgment against her, Chase filed documents that required Ms. Uhlmeier to appear for an oral hearing.¹¹ Ms. Uhlmeier's failure to appear was later used to obtain a civil contempt order, which resulted in Ms. Uhlmeier's arrest.¹² Part III describes the circumstances under which a creditor's request for an oral examination constitutes a pretext for their ultimate goal of getting civil contempt orders and arrest warrants issued against consumers. Such misuse of the civil contempt process is a criminalization practice that constitutes extortion because the consumer is coerced into paying to avoid arrest or to get out of jail.

Part IV then argues for the prosecution of creditors for extortion to deter creditors from using criminalization practices to evade state constitutions that prohibit the incarceration of individuals for unpaid civil debts. If left unprosecuted, creditors will not only make a mockery of state constitutions, they will also continue violating various consumer protection statutes that prohibit threats of arrests against consumers for failure to pay civil debts. Because the creditors described in this article have built their business models on issuing extremely high-cost credit to cash-strapped consumers, their customers are, at the outset, vulnerable to extortive threats. This vulnerability makes it more likely that they will heed the creditors' demands to pay—by borrowing from other lenders, using protected income sources, or begging friends and relatives to pay their debts. As a result, creditors should be prosecuted to protect these vulnerable consumers from going further into debt and to protect indebted consumers' dependents and other loved ones.

9. In addition to being prosecuted on the basis that they threaten to accuse consumers of crime, some creditors should be prosecuted on the grounds that they have subjected consumers to humiliation and exposed their indebtedness to others by contacting their friends and relatives and by showing up at their places of employment. *See, e.g.,* Westlake Consent Order, *supra* note 8.

10. *See supra* notes 2–5 and accompanying text.

11. Serres & Howatt, *supra* note 1.

12. *Id.*

Beyond prosecution, part V proposes solutions that include completely banning payday lenders from filing criminal complaints, police reports, or taking other action that causes a consumer to be accused of, or charged with, a crime related to a payday loan debt. To address criminalization tactics employed by RTO companies, state legislatures should amend any theft statutes related to rental property to exclude consumers who obtained RTO property for personal, family, or household use. To deter the misuse of civil contempt, states should amend their civil procedure rules to prohibit a creditor from requesting an oral examination in the absence of documented proof that the consumer is an above-median-income debtor. Otherwise, creditors will continue to use oral examination requests as a pretext to achieving their real goal—a warrant for the consumer’s arrest.

Proposed solutions also include allowing consumers to collect both treble and punitive damages from creditors that have engaged in consumer criminalization tactics. The occasional payment of a civil fine by some creditors appears to be insufficient to deter them from employing consumer debt criminalization tactics. When the cost of doing wrong outweighs the benefits gained from doing right, then creditors will be deterred from using consumer criminalization tactics. Lawmakers should, at a minimum, make unenforceable the creditors’ arbitration clauses and class action waiver provisions. Otherwise, creditors will continue to exploit the criminal justice system to terrorize consumers via threats of arrest while simultaneously engaging in duplicitous tactics to lock those same consumers out of the civil court system.

II

CRIMINALIZATION VIA LENDERS’ THREATS OF IMMINENT INCARCERATION AND FILING OF CRIMINAL COMPLAINTS

The term “consumer debt criminalization” explains two common criminalization tactics: creditors’ threatening consumers with imminent arrest and creditors’ filing criminal complaints that lead to consumers being formally accused of crimes and sometimes arrested.¹³ This part provides new examples of these criminalization tactics and asserts that they constitute extortion. When criminalization practices only take the form of threats to have the consumer arrested, such threats may seem trivial. However, nothing can be further from the truth. Numerous federal and state enforcement actions demonstrate that consumers regularly succumb to these threats by paying phantom debts, that is, debts not actually owed, or by paying amounts far in excess of what is owed.¹⁴

13. I first used the term “consumer debt criminalization practices” in a law review article to describe the pervasive use of such practices against women and their disparate impact on them. *See* Johnson, *supra* note 7, at 47–50.

14. *See, e.g.*, Press Release, Fed. Trade Comm’n, FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown against Abusive Debt Collectors (Nov. 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement->

The lenders' threats to have consumers arrested and charged with a crime are made to intimidate consumers into complying with the lenders' demands by making payments or turning over personal property like cars or furniture.¹⁵

When criminalization practices take the form of a lender actually filing a police report or obtaining a warrant for the consumer's arrest, such actions are taken by the lender to coerce consumers into immediately complying with the lender's demands.¹⁶ A consumer who may not have been moved by a verbal threat will then be confronted with the real possibility of going to jail because of the lender's actions. Under those circumstances, consumers try, and often find a way, to pay to avoid going to or to get out of jail.

These criminalization practices constitute extortion because the creditors' threats and conduct engender fear in consumers that results in consumers losing control of their bank accounts, relinquishing ownership of their vehicles, losing possession of their rent-to-own merchandise, and, sometimes, losing their freedom (at least temporarily).¹⁷

partners-announce [<https://perma.cc/2D4F-LKBB>] (announcing the results of Operation Collection Protection, a nationwide initiative by the FTC, in collaboration with 71 enforcement partners, which as of that date, had led to the filing of 115 cases and the shutting down of several companies, including companies that used threats to coerce consumers into making payments on phantom payday loan debts (in other words, debts not owed) or making payments to companies lacking the authority to collect such debts). See Press Release, Fed. Trade Comm'n, FTC Action: Debt Collector Banned from Collection Business (Aug. 24, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-action-debt-collector-banned-collection-business> [<https://perma.cc/73R7-67JN>] (summarizing the settlement of a case filed by the FTC and New York's Attorney General against four debt collection companies "charg[ing] them with collecting on fake payday loans they knew consumers did not really owe, and using deceptive and abusive tactics to get them to pay, including false threats of lawsuits and arrest"); Press Release, Dep't of Justice, Florida Residents Sentenced for Defrauding and Threatening Spanish-Speaking Consumers (Jan. 9, 2014), <https://www.justice.gov/opa/pr/florida-residents-sentenced-defrauding-and-threatening-spanish-speaking-consumers> [<https://perma.cc/PYR3-EK4H>] (summarizing the conviction of two individuals operating a scam that defrauded Spanish-speaking consumers using numerous threats, including threats of arrest and deportation); Press Release, Fed. Trade Comm'n, FTC Takes Action to Stop Phantom Debt Scam that Targeted Spanish-Speaking Consumers Nationwide (Oct. 23, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-takes-action-stop-phantom-debt-scam-target-ed-spanish-speaking> [<https://perma.cc/2VQH-6L6J>] (summarizing a temporary restraining order imposed on debt collectors targeting Spanish-speaking persons who collected over \$2 million of non-existent debt, or "phantom debt," by continually calling and harassing the victims and sometimes abusing them with profane language). See also CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2017 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf [<https://perma.cc/LA2M-AG4S>] (summarizing numerous cases filed in 2016 separately by the CFPB and the FTC against companies and individuals accused of violating the Fair Debt Collection Practices Act, stating that debt collection companies and their attempts to collect phantom debts comprise the majority of complaints submitted by consumers to the CFPB's Consumer Response program, and announcing that in cases filed by the CFPB consumers received \$39 million in restitution).

15. See, e.g., *infra* notes 20–40 and accompanying text.

16. See, e.g., *infra* notes 70–81 and accompanying text.

17. See *infra* notes 42–69 and accompanying text (analyzing extortion law and asserting that creditors commit criminal extortion when they make threats to have consumers arrested for unpaid civil debts or threats to expose their debts to others); *infra* notes 82–112 and accompanying text (explaining how creditors commit extortion when they file police reports and take similar actions to have consumers

A. Creditors Threats Of Arrest Often Successfully Coerce Consumers Into Paying Or Turning Over Assets

Some lenders only make threats to have a consumer arrested, and they do so by conjuring in the consumer's mind illusions of an imminent arrest. Sometimes the threat is based on an actual criminal statute that seems to match the consumer's conduct.¹⁸ Other times, creditors accuse consumers of crimes that do not apply to the consumers' conduct, relying on opaque criminal statutes that consumers do not understand.¹⁹ Virginia Robinson, a resident of West Virginia, provides a glaring example of a consumer who fell prey to criminal accusations after defaulting on a car title loan from Fast Auto Loans, Inc. (FAL).²⁰

Under a car title loan, a vehicle that the consumer owns outright is used as collateral to secure a personal loan equal to only a fraction of vehicle's value.²¹ To get the loan, the consumer generally must bring the vehicle to the lender and surrender a clean certificate of title, which is proof that the consumer owns the vehicle and no other lender has a lien or claim against the vehicle.²² Car title loans are legal in many states, even though they carry triple-digit interest rates and could lead to the loss of a consumer's vehicle—often the only reliable

arrested for failing to pay debts or to relinquish possession of their assets).

18. See Johnson, *supra* note 7, at 20–28 (describing how companies accuse consumers of committing crimes, such as passing a bad check to get a payday loan, and then successfully create the illusion of imminent incarceration to coerce consumers into paying phantom payday loan debts or paying amounts far greater than owed).

19. See, e.g., *infra* notes 28–37 and accompanying text (explaining how a car title lender used an opaquely worded criminal statute to accuse Virginia Robinson of a crime for failing to immediately allow the lender to repossess her vehicle).

20. Trial Pleading at 60, West Virginia *ex rel.* McGraw v. Fast Auto Loans Inc., No. 3:12-cv-64, 2012 WL 4864760 (N.D.W. Va. 2012) [hereinafter WV's Complaint] (Exh. J. - Affidavit of Virginia Robinson).

21. AMANDA QUESTER & JEAN ANN FOX, CAR TITLE LENDING: DRIVING BORROWERS TO FINANCIAL RUIN 4 (2005), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr008-Car_Title_Lending-0405.pdf [<https://perma.cc/8SPG-59ZQ>] (stating that car title loans are sometimes referred to as auto title loans, car title pawns, title pledge loans, or other similar names, and are marketed to cash-strapped, credit-challenged consumers).

22. See, e.g., *In re Schwalb*, 347 B.R. 726 (Bankr. D. Nev. 2006) (stating that the debtor provided two clean certificates of title to obtain loans secured by two vehicles, holding that the car title lender violated several provisions of Article 9 of the Uniform Commercial Code, and imposing on the lender minimum statutory damages of nearly \$26,000 for its violations) (applying Nevada law). See generally Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 542 (2012) (describing the steps to obtain a car title loan and stating that borrowers usually have to produce clear title).

transportation.²³ West Virginia, however, is one of a few states that judicially banned car title loans.²⁴

Because of West Virginia's ban, Ms. Robinson had to cross the border to Virginia to obtain a \$1,000 loan secured by her 1999 Jeep Cherokee.²⁵ Ms. Robinson stated in an affidavit that after she defaulted on her loan payments, FAL's employees repeatedly called her daughter, friends, and co-workers and left messages that FAL would take her Jeep if she failed to pay the car title loan.²⁶ On the occasions when Ms. Robinson was able to speak by telephone with a FAL employee, the employee would threaten to send a repossession agent, known as a "repo man," along with a sheriff's deputy to pick up the Jeep.²⁷

FAL eventually sent a repo man to Ms. Robinson's home. Because she was not home, the repo man left a written document with her daughter captioned "**CERTIFICATE OF SERVICE.**"²⁸ The document contained several bold faced, all capitalized paragraphs, one of which ended with the following crime she supposedly committed: "**A 3RD DEGREE FELONY CONVERSION OF COLLATERALIZED PROPERTY.**"²⁹

The document given to Ms. Robinson also cited to and quoted from a Virginia statute describing larceny as the fraudulent conversion or removal of property subject to a lien.³⁰ A person is guilty of larceny under this statute if, among other things, he or she conceals the location of property that is subject to a lien.³¹ Another provision of the Virginia code makes it a larceny to "fraudulently sell, pledge, pawn or remove such property from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof."³² This

23. See Delvin Davis, Press Release, Consumers Lose \$8 Billion In Fees Each Year With Payday And Car-title Loans, Center for Responsible Lending (May 17, 2016), <http://www.responsiblelending.org/media/consumers-lose-8-billion-fees-each-year-payday-and-car-title-loans> [<https://perma.cc/56VK-3T72>] (stating that car title lending is legal in 23 states). See, e.g., *Gregoria v. Total Asset Recovery, Inc.*, No. 12-4315, 2015 WL 115501 (E.D. Pa. Jan. 8, 2015) (holding that a repossession agent for a car title lender could be found liable under RICO for repossessing a car after the consumer's default on a loan with a 150% interest rate, which was usurious under Pennsylvania law).

24. Car title lending is illegal in West Virginia by judicial decision. See *State ex rel. McGraw v. Pawn America*, 518 S.E.2d 859, 861 (W. Va. 1998).

25. WV's Complaint, *supra* note 20, Exh. J. at 1.

26. *Id.* at 1–2.

27. *Id.* at 2.

28. *Id.* at 3 (identifying the repo man as an employee from K.A.R. Towing, a repo company located in Harrisburg, Virginia) (emphasis in certificate).

29. *Id.* (emphasis in certificate).

30. *Id.* at 3.

31. *Id.*

32. VA CODE ANN. § 18.2-115. The statute provides in relevant part:

[A]ny person is in possession of any personal property, including motor vehicles or farm products, in any capacity, the title or ownership of which he has agreed in writing shall be or remain in another, or on which he has given a lien, and such person so in possession *shall fraudulently sell, pledge, pawn or remove such property* from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property or fraudulently remove the same from the Commonwealth [of Virginia], without

statute became law in 1975, decades before the high-cost lenders like FAL began issuing car title loans.³³ No evidence on the record shows that Ms. Robinson intended to sell, destroy, or dispose of her own car. Furthermore, she must have had FAL's permission, at least implicitly, to move her vehicle outside Virginia because FAL knew she lived and worked in West Virginia, a state in which car title lending is not legal.³⁴ Ms. Robinson did not sell or get rid of her car; she simply could not afford the payments on the car title loan. Therefore, she could not have been guilty of larceny. However, if Ms. Robinson and other borrowers threatened with arrest read only the Certificate of Service or looked online for the cited larceny statute, they could have erroneously concluded that they had committed a crime and could only avoid prosecution by turning over their vehicles to FAL or by paying the entire debt owed.

Research has not uncovered any cases or news reports indicating that a consumer who has defaulted on a car title loan can be prosecuted under this Virginia criminal statute. Therefore, FAL had no basis to believe such a prosecution was possible, and it never intended to seek the prosecution of Ms. Robinson. This conclusion is supported by a lawsuit filed by Darrell McGraw, former Attorney General for West Virginia, against FAL, its parent company, and their officers (hereinafter the "FAL defendants").³⁵ According to the lawsuit, the FAL defendants repeatedly violated the state's consumer protection law by, among other things, threatening to accuse consumers of crimes and have them arrested.³⁶ The motive for such threats was to coerce consumers into making payments or turning over their vehicles.³⁷ By conjuring up this larceny crime and by repeatedly harassing the customers who had defaulted, FAL was able to do exactly what it wanted—take cars belonging to Ms. Robinson³⁸ and others and

the written consent of the owner or lienor or the person in whom the title is, or, if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, *he shall be deemed guilty of the larceny thereof.*

Id. (emphasis added).

33. *See id.*

34. *See* WV's Complaint, *supra* note 20, at ¶¶16–17 (alleging that the majority of West Virginia residents who obtained a car title loan from the FAL defendants had to cross the state border into Virginia and identifying 512 certificate of titles with notations of liens filed by the FAL defendants in the state of West Virginia, not Virginia).

35. *Id.*

36. *See* Second Amended Complaint, *State v. Fast Auto Loans, Inc.*, 2013 WL 8539987 (W. Va. Cir. Ct.) (No. 12C231) [hereinafter WV's Second Amended Complaint].

37. *See id.* at ¶¶ 64–65 (alleging that the defendants also "wrongfully enlist[ed] uniformed police officers to carry out vehicle seizures without a court order").

38. WV's Complaint, *supra* note 20, Exh. J. at 1. After the repo man left the Certificate of Service, another repo man, acting on FAL's behalf, appeared at Ms. Robinson's place of employment to try to get her to turn over her vehicle. *Id.* at 2. Thereafter, Ms. Robinson stated that she continued to get telephone calls at least every other day from FAL's employees. *Id.* She finally decided to surrender the vehicle to FAL, which subsequently sold it. *Id.* Although she made several payments on the \$1,000 loan, Ms. Robinson stated that FAL never gave her an accounting of the sale proceeds and never gave her surplus funds in excess of the debt owed, as required under secured transactions law. *Id.* *See also* West Virginia *ex rel.* McGraw v. Fast Auto Loans, Inc., 918 F. Supp. 2d 551, 553 (N.D.W. Va. 2013)

sell them, allegedly in violation of the state's consumer protection law.³⁹ The West Virginia Attorney General's investigation revealed that the FAL defendants had repossessed at least 218 vehicles owned by West Virginia residents.⁴⁰

Given the flagrant practices of the FAL defendants and other lenders, several states have sued some of them for numerous violations, including making unlawful threats against consumers.⁴¹ As explained in part II.B, law enforcement and prosecutors need to recognize that these same threats amount to extortion and lenders should be prosecuted for making them.

(summarizing West Virginia's allegations, including an allegation that FAL failed to comply with state law by failing to provide written notices accounting for the sale of repossessed vehicles and by failing to refund surplus proceeds when consumers were entitled to receive them).

39. See WV's Second Amended Complaint, *supra* note 36, at ¶¶ 64–65 (alleging that the FAL defendants made direct threats to consumers to have them prosecuted and used police officers to help coerce consumers into relinquishing ownership of their vehicles). See also *Fast Auto Loans*, 918 F. Supp. 2d at 563–65 (granting West Virginia's motion to remand its lawsuit against the FAL defendants back to state court).

40. See Chris Dickerson, *AG's Office Reaches \$1.2M Settlement in Auto Title Lender Case*, W. VA. RECORD (Apr. 9, 2014), <https://web.archive.org/web/20170426132902/http://wvrecord.com/stories/510586931-ag-s-office-reaches-1-2m-settlement-in-auto-title-lender-case> (Under the settlement, the companies agreed to close all accounts, cancel all debt owed to them by West Virginia consumers (estimated at \$816,000), return any unsold vehicles seized from state residents, and remove any liens on those vehicles). The FAL defendants eventually settled the case filed against them by agreeing to pay \$1.2 million but not admitting to any wrongdoing. *Id.* Whatever compensation Ms. Robinson and others were able to obtain from the settlement; it would not be enough to restore the loss of valuable vehicles that the lenders re-sold to others.

41. See, e.g., *id.* In addition to the state of West Virginia, other state and federal authorities have filed enforcement actions against RTO companies, payday lenders, and car title lenders for violating applicable laws by, among other things, engaging in unlawful debt collection practices. See, e.g., Appendix D, *Rent-A-Center West, Inc. v. Washington*, No. 08-2-32502-4 SEA (Wash. Super. Ct. Feb. 26, 2010) (In defense of a 2009 lawsuit filed by Rent-A-Center against the State of Washington and its then Attorney General James Sugarman, the state obtained written sworn statements from customers who described under penalty of perjury practices by Rent-A-Center's employees that amount to unlawful and abusive collection tactics, including making threats to have customers arrested); Consent Decree, *Rent-A-Center West, Inc. v. Washington*, No. 08-2-32502-4 SEA, 2010 WL 2572150 (Wash. Super. Ct. Feb. 26, 2010) (lacking an admission of wrongdoing, Rent-A-Center entered into a consent decree with Washington and agreed to pay a fine); Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into a Cycle of Debt (July 10, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt> [<https://perma.cc/HA6K-E7LX>] (In a lawsuit filed by the CFPB against ACE Cash Express, the second largest payday lender, the CFPB alleged that ACE's own in-house employees as well as ACE's third-party debt collectors threatened consumers with criminal prosecution and uncovered an ACE training manual with a graphic image allegedly demonstrating how ACE employees were expected to create a "sense of urgency" in order to get consumers to pay); Press Release, Mich. Att'y Gen. Bill Schuette, *Schuette Secures Victory Against Auto Title Loan Company Liquidation, LLC to Protect Michigan Residents from Illegal Title Loans* (June 8, 2016), <https://web.archive.org/web/20170424204834/http://www.michigan.gov/ag/0,4534,7-164-46849-386461--,00.html> (announcing that Michigan's attorney general obtained a default judgment and permanent injunction against Liquidation, LLC, along with several related defendants, for numerous violations, including making illegal car title loans and engaging in unlawful collection practices, such as illegally repossessing consumers' vehicles and stealing the equity after selling the vehicles).

B. Creditors' Threats Constitute Extortion Because They Accuse The Consumer Of Committing Crimes And They Expose The Consumer's Indebtedness

Extortion is the making of a threat to incite fear in another person to induce that person to hand over money or other property.⁴² Each state's statute identifies several types of threats that form the basis for an extortion or coercion prosecution.⁴³ Among the list of unlawful threats is threatening to accuse a person of committing a crime to induce fear in that person in order to extract money or other property.⁴⁴

A close analysis of the investigation conducted by West Virginia's Attorney General against the FAL defendants provide examples of extortion and how they could have prosecuted them for using threats to coerce Ms. Robinson and others into relinquishing ownership of their vehicles. First, consider the following language in the Certificate of Service given to Ms. Robinson:

FAILURE TO COMPLY WITH THIS NOTICE IS UNLAWFUL UNDER THE PROVISION OF VIRGINIA CODE (SECTION 18 PARAGRAPH 2, SUBPARAGRAPH 115/118) IF UNDER A LEIN, AND IS A 3RD DEGREE FELONY CONVERSION OF COLLATERIALIZED PROPERTY.

SHOULD YOU FAIL TO CONTACT K.A.R. TOWING IMMEDIATELY AT (540) 564-0131, YOUR INACTION WILL GIVE LITTLE CHOICE AND MAY RESULT IN A COMPLAINT BEING FILED WITH YOUR LOCAL MAGISTRATE. THIS MAY RESULT IN A FELONY WARRANT BEING ISSUED FOR YOUR ARREST.⁴⁵

The second page of the document begins with the following question: "Is it against the law to hide your car from being repossessed?"⁴⁶ It provided the following short answer: "In Virginia = yes."

Under Virginia and West Virginia law,⁴⁷ the words contained in the Certificate of Service constitute extortion because they threaten to accuse Ms. Robinson of a crime. Examine the above words in light of a relevant case in which the court construed the defendant's writing as an implied threat to accuse

42. See 3 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 20.4 (2d. ed. 2003 & 2016 Update).

43. *Id.*; RUTTER GROUP-CAL. CRIM. L., *supra* note 6, at § 8:83 (describing four unlawful threats under California law).

44. See 3 LAFAVE, *supra* note 42. See, e.g., N.Y. PENAL L. § 135.60(4) (2008) ("A person is guilty of coercion in the second degree when he or she compels or induces . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will . . . [a]ccuse some person of a crime or cause criminal charges to be instituted against him or her").

45. WV's Complaint, *supra* note 20, Exh. J. at 3 (emphasis in certificate).

46. *Id.* at 3-4.

47. In Virginia, "[a]ny person who (i) threatens injury to the character, person, or property of another person, (ii) accuses him of any offense, . . . and thereby extorts money, property, or pecuniary benefit or any note, bond, or other evidence of debt from him or any other person, is guilty of a Class 5 felony." VA. CODE ANN. § 18.2-59 (2016). In West Virginia, "[i]f any person threaten injury to the character, person or property of another person, or to the character, person or property of his wife or child, or to accuse him or them of any offense, and thereby extort money, pecuniary benefit, or any bond, note or other evidence of debt, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years." W. VA. CODE § 61-2-13 (2016).

someone of a crime, resulting in an extortion conviction. In *People v. Umana*,⁴⁸ co-defendants Jessica Langshaw and Raul Umana devised a scheme whereby Langshaw, after finding men in an internet chat room and meeting them in person, would have sex with them and then later accuse them of rape.⁴⁹ Both defendants were convicted of several counts of attempted extortion.⁵⁰ On appeal, Langshaw challenged her convictions involving one victim, Jared P., a man that Langshaw met when she was only seventeen years old.⁵¹ Langshaw argued that her conviction involving him should be overturned because he had committed a crime (statutory rape) given that he knew that she was under-age when the two had sex.⁵² She argued that her letter to him was an attempt to settle a potential civil claim against him, not to accuse him of a crime.⁵³ The appellate court focused on the following relevant language in her letter to Jared:

I would like to settle this matter in confidence, but I'm prepared to take further action if you wish to dispute my claim. As you know, I've notified the Sacramento Police Department and State District Attorney. I have also made arrangements with an attorney to bring civil charges against you if you refuse to meet the above demands.⁵⁴

The court noted that Langshaw stated that she was “prepared to take further action” but did not specify what action, and made reference to bringing “civil charges.”⁵⁵ According to the court, those words and the letter as a whole contained an implied threat to continue accusing him of a crime and seeking prosecution if he did not meet her demands.⁵⁶

The court further stated this inference was supported by her actions.⁵⁷ She had already spoken to the district attorney about bringing charges against the victim and was still in contact with the police at the time she wrote the letter.⁵⁸ Thus, Langshaw made an implicit threat to continuing accusing him of a crime.⁵⁹

The case for an extortion conviction against the FAL defendants would be even stronger than the case against Langshaw. The Certificate of Service constitutes an explicit threat given that it never uses “settle,” “settlement,” or similar words. Additionally, it cites to and quotes the entire larceny statute it accuses Ms. Robinson of violating. By using the caption “Certificate of Service,” the writing also creates the impression that some type of legal action against Ms. Robinson may have already begun. Moreover, it uses the words “warrant” and

48. *People v. Umana*, 138 Cal. App. 4th 625 (Cal. Ct. App. 2006).

49. *Id.* at 628–29.

50. *Id.*

51. *Id.* at 640–42.

52. *Id.*

53. *Id.* at 638.

54. *Id.*

55. *Id.*

56. *Id.* at 640 (“Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases.”).

57. *Id.*

58. *Id.*

59. *Id.*

“arrest.”⁶⁰ Therefore, a jury could easily conclude that the FAL defendants committed extortion by explicitly threatening to accuse Ms. Robinson of committing a crime.⁶¹

In addition to this written communication, the conduct of the defendants and their repo agents threatened to injure, and did in fact injure, Ms. Robinson’s character. In most states, threatening to expose someone else’s secrets to subject them to humiliation or harm their character to extract property constitutes an unlawful threat supporting an extortion conviction. A Virginia case, *Stein v. Commonwealth*, provides an illustration.⁶² There, the defendant felt that his wife had been wrongfully terminated and, as a result, sent letters to the supervisor threatening to expose the fact that she had previously been involved in a sadomasochistic sexual relationship.⁶³ Because the defendant’s written communications included words such as “settlement” and “terms,” he argued that his actions were mere attempts to reach a settlement so that his wife could receive an apology and have her employment records protected.⁶⁴ The *Stein* court disagreed, reasoning that no settlement—in the sense of each party giving up something to resolve an employment dispute—had been proposed. Instead, the defendant only proposed to abstain from exposing the supervisor’s previous sadomasochistic relationship.⁶⁵ His words conveyed a threat to injure the supervisor’s character and, as a result, were sufficient to sustain his extortion conviction.

Like the defendant in *Stein*, the FAL defendants threatened to expose Ms. Robinson’s indebtedness to others and followed through on those threats when they contacted her friends, relatives, and co-workers.⁶⁶ According to Ms. Robinson, the FAL defendants not only told others about Ms. Robinson’s loan default but also about their intention to repossess her vehicle.⁶⁷ Moreover, one of FAL’s repo men actually came to Ms. Robinson’s place of employment, asked her co-worker to identify Ms. Robinson, and discussed with the co-worker the

60. See WV’s Complaint, *supra* note 20, Exh. J. at 3 (It plainly states: “THIS MAY RESULT IN A FELONY WARRANT BEING ISSUED FOR YOUR ARREST.”) (emphasis in original).

61. The testimony of Ms. Robinson and other consumers who borrowed from FAL would show the company engaged in a pattern of making threats. See WV’s Second Amended Complaint, *supra* note 36, at ¶ 62 (The FAL defendants “shamed or coerced consumers to make payments and to relinquish possession of vehicles by accusing them of fraud, crimes and other conduct that, if true, would tend to disgrace them or subject them to ridicule or contempt of society, in violation of W. Va. Code § 46A-2-124(b) and W. Va. Code § 46A-6-104.”).

62. *Stein v. Commonwealth*, 402 S.E.2d 239 (Va. Ct. App. 1991).

63. *Id.* (Prior to the wife’s termination, the wife and the supervisor had been friends and the supervisor had revealed her involvement in a previous sadomasochistic relationship.).

64. *Id.* at 242.

65. *Id.* at 241 (stating that extortion is using “wrongful methods” or acting in “an unlawful manner: in order “to compel payments by means of threats of injury to person, property, or reputation”) (quoting *Extort*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

66. See WV’s Complaint, *supra* note 20, Exh. J. at 2–3.

67. *Id.* at 1–2.

location of Ms. Robinson's vehicle.⁶⁸ All of this was done to injure Ms. Robinson's character by exposing her financial troubles to others for the purpose of getting her to turn over the vehicle. According to the West Virginia Attorney General's lawsuit and the sworn declarations submitted by consumers, the FAL defendants violated state law by regularly engaging in a pattern of exposing consumers' indebtedness to others.⁶⁹ This amounts to extortion.

C. Some Creditors Move From Making Threats To Actually Filing Police Reports To Have Consumers Arrested

Though the FAL defendants only made threats, some creditors go a step further and actually file criminal complaints or police reports to extort money or property from consumers. Janellen Edwards' experience is instructive because it demonstrates that even when a creditor knows that a consumer has not committed a crime, it nevertheless has the ability to initiate an arrest in order to intimidate the consumer into paying or turning over property.⁷⁰

Ms. Edwards signed an RTO contract to buy three pieces of furniture from TRS Home Furnishings (TRS) and, thereafter, made a few payments.⁷¹ Due to a family crisis, she was unable to pay under the agreed schedule.⁷² She asked for and received from TRS a revised payment schedule.⁷³ After Ms. Edwards made the first payment under the new schedule, TRS employees demanded full payment of the entire outstanding balance.⁷⁴ TRS's intimidating behavior included making daily calls demanding that Ms. Edwards pay, leaving voicemail messages threatening to show up at her house to repossess the furniture, exposing

68. *Id.*

69. WV's Second Amended Complaint, *supra* note 36, at ¶ 59 ("The Defendants routinely, systematically, and repeatedly contact consumer's employers, co-workers, references, family members, friends, and other third parties to leave messages for the consumer to contact them when, in fact, the Defendants have current location information for the consumers and when the true purpose of the call is to annoy, abuse, harass, embarrass or humiliate the consumer, and to disclose the fact that the consumer owes a delinquent debt directly or indirectly, in violation of W. Va. Code § 46A-2-126(b) and W. Va. Code § 46A-6-104.").

70. Because Ms. Edwards endured several weeks of escalating threats from the RTO company until she was eventually arrested, her story is very lengthy. Rather than provide upfront the entire narrative of her ordeal, the discussion will begin with a brief summary and then highlight the parts of Ms. Edwards' ordeal that are relevant to each count of extortion the RTO company could have been charged with committing. See Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at ¶ 1, *Edwards v. TRS Home Furnishings*, No. 0906-08151, 2010 WL 5497167 (Or. Cir. July 19, 2010).

71. Amended Complaint at ¶ 2, *Edwards v. TRS Home Furnishings*, No. 0906-08151, 2010 WL 5497172 (Or. Cir. Feb. 9, 2010) (stating that TRS was an assumed business name for The Rental Store, Inc.). Ms. Edwards purchased furniture from TRS in hopes of improving her credit. See Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at ¶ 2 (stating that a "financial counselor suggested that she [Edwards] make a large purchase on credit, which would in turn improve the rest of her credit").

72. See Plaintiff's Memorandum in Opposition for Summary Judgment, *supra* note 70, at ¶ 5 (Ms. Edwards' father was diagnosed with cancer.).

73. *Id.* at ¶ 8.

74. *Id.* at ¶ 9.

her indebtedness to relatives and friends, and appearing more than once at her home and job to force her to turn over the furniture.⁷⁵

When none of these threats achieved the desired results, a TRS employee filed a complaint with the local police department.⁷⁶ Thereafter, two police officers arrived at Ms. Edwards' workplace to issue a criminal citation and inform her of the required court appearance.⁷⁷ She was later arrested. According to Ms. Edwards, the prosecutor tried to get her to plead guilty, but she refused.⁷⁸ She did, however, return all of the furniture to TRS and pay the entire debt. Ms. Edwards hired an attorney, who succeeded in getting the criminal case against her dismissed.⁷⁹ Before the case was dismissed, Ms. Edwards had to appear in court several times to respond to the charges initiated by TRS.⁸⁰

Ms. Edwards eventually filed a civil lawsuit against TRS and, after a jury trial, won a verdict on three claims, including malicious prosecution and intentional infliction of emotional distress.⁸¹ Her success on these claims supports the assertion that TRS committed extortion.

D. Creditors Commit Extortion When They Know The Consumer Has Not Committed a Crime But Nevertheless File Police Reports

Based on the above conduct, TRS committed extortion by threatening to (and actually) exposing Ms. Edwards' indebtedness to others and by threatening to (and actually) accusing her of a crime in order to force her to pay and turnover her furniture.

Evidence produced by Ms. Edwards at trial shows TRS violated Oregon's Uniform Debt Collection Practices Act by exposing Ms. Edwards' indebtedness to others to coerce full payment from her.⁸² The Oregon act prohibits numerous collection practices, including "[c]ommunicat[ing] or threat[ing] to communicate with a debtor's employer concerning the nature or existence of the debt."⁸³ A TRS employee not only showed up at Ms. Edwards' job, but TRS employees also left several voicemail messages on a telephone line where her co-workers and supervisor heard that she owed TRS money.⁸⁴ As a result, Ms. Edwards was

75. *Id.* at ¶¶ 10–13.

76. *Id.* at ¶ 18.

77. Amended Complaint, *supra* note 71, at ¶ 14.

78. *Id.*

79. *Id.*

80. *Id.*

81. General Judgment at 2, *Edwards v. TRS Home Furnishings*, No. 0906-08151, 2010 WL 5497172 (Or. Cir. Feb. 9, 2010). Ms. Edwards also won on her claim that TRS violated several provisions of the state's debt collection law. *Id.*

82. For a further explanation of the Oregon Uniform Debt Collection Practices Act, see Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at 6. See also OR. REV. STAT. § 646.639 (2015).

83. OR. REV. STAT. § 646.639(2)(f).

84. Plaintiff's Memorandum in Opposition to Motion for JNOV and for New Trial at 12, *Edwards v. TRS Home Furnishings*, No. 0906-08151, 2010 WL 8593165 (Or. Cir. Oct. 6, 2010).

extremely embarrassed and did not want to go to work.⁸⁵ The only question now is what did TRS's employees intend by such actions. The purpose of the voicemail messages about Ms. Edwards' indebtedness was to cause her to become embarrassed to such a degree that she would be coerced into either paying in full or turning over the furniture.⁸⁶ Oregon case law has already recognized this unlawful collection method—revealing debts to the consumer's employer—as prohibited precisely because it is an “abusive method[] [used] to pressure debtors to pay.”⁸⁷ Accordingly, TRS's conduct amounted to extortion.

In addition to committing extortion by exposing Ms. Edwards' indebtedness, TRS committed extortion by threatening to accuse her of a crime. As with the threats discussed in part II.B., these threats must be addressed because TRS and other RTO dealers will argue that the very existence of property-related theft crimes gives RTO dealers the right to file police reports and, thereby, protects them from prosecution for extortion.

Ms. Edwards' civil complaint against TRS failed to identify the specific crime TRS accused her of committing. However, she was most likely charged with criminal possession of rented or leased personal property, a felony in Oregon's criminal code.⁸⁸ The RTO industry has lobbied for the passage of laws criminalizing a consumer's failure to pay for RTO property or failure to relinquish possession of RTO property.⁸⁹ As a previous article explained in detail, consumers who obtain RTO merchandise are unlawfully being charged with crimes when they can no longer make the required payments.⁹⁰ As one court has articulated, such a crime is a specific intent crime.⁹¹ Thus, simply showing that a consumer has failed to return RTO property does not meet the mens rea requirement.⁹² Moreover, based on the outcome of Ms. Edwards' lawsuit against

85. *Id.*

86. *Id.* at 12–13.

87. *See* Porter v. Hill, 838 P.2d 45, 49 (Or. 1992).

88. *See* OR. REV. STAT. § 164.140(1)(a).

89. *See, e.g.,* Johnson, *supra* note 7, at 57–58 (describing how RTO dealers in Florida lobbied state lawmakers to amend a criminal statute to make it easier to convict a consumer of a crime based on the consumer's failure to turn over possession of RTO property).

90. *See id.*

91. *See* State v. Sanders, 905 So. 2d 241, 242–43 (Fla. Dist. Ct. App. 2005) (Altenbernd, C.J., concurring).

92. *See id.* Chief Judge Altenbernd further explained why intent to commit the theft crime could not be based on the fact that Ms. Sanders failed to return the RTO property after the company sent a demand letter:

Maybe Ms. Sanders' husband or boyfriend ran off with the furniture, and she cannot return it. Maybe her house burned down, and the furniture was destroyed. Maybe the landlord evicted her and kept the furniture. Maybe the furniture was destroyed in a hurricane. The point is that under the law established . . . mere proof that the certified letter was returned undeliverable would not actually be sufficient to establish . . . the intent for this crime of theft. *Being poor and unable to pay your debts is still not a crime in Florida.*

Id. at 243 (emphasis added). *See also* Bert v. Commonwealth, No. 1499–10–1, 2011 WL 4916203, at *3 (Va. Ct. App. Oct. 18, 2011) (A Virginia court reversed the appellant's conviction for failing to return an RTO television and held that “[a]lthough the Commonwealth's evidence was sufficient to prove that

TRS, the company knew she had tried to make payments but refused to accept any more partial payments.⁹³ The jury, therefore, found TRS liable for malicious prosecution because it initiated criminal proceedings against her without probable cause to believe a crime had been committed.⁹⁴ Without probable cause to believe a crime had been committed, TRS's motive in threatening to accuse her of a crime and eventually filing a police report against her was to coerce her into complying with its demands. That is extortion.

Although TRS and other RTO dealers will argue they reasonably believe a crime is afoot when a customer fails to return RTO merchandise, courts and juries can readily peel back the thin veil of this argument by looking to the true purpose for calling the police. An analogous case, *Lashley v. Bowman*,⁹⁵ is instructive on this point. There, a restaurant owner called the police after a patron, Ms. Lashley, refused to pay for lobster that she found inedible due to it being partially frozen.⁹⁶ When the police officer arrived and heard the owner's version of events, the police officer told Ms. Lashley that she had to pay for the food or she would be taken to jail.⁹⁷ After the owner signed an affidavit stating that he wanted Ms. Lashley arrested for defrauding an innkeeper, the officer handcuffed Ms. Lashley on the spot and led her out of the restaurant into a squad car.⁹⁸ Ms. Lashley fought the criminal charge, which was eventually dropped, and then sued the owner for malicious prosecution.⁹⁹

The court denied the owner's motion to dismiss after determining that a jury could find that the owner lacked probable cause to believe Ms. Lashley had committed fraud on an innkeeper.¹⁰⁰ Instead, "the true purpose and intent behind the [owner's] calling the police was to attempt to coerce and intimidate this patron into paying money."¹⁰¹ The owner admitted that he never tested or looked at the lobster to determine whether it was frozen or inedible.¹⁰² The owner also admitted that he assumed that Ms. Lashley would simply "pay up" and admitted

appellant breached her written lease agreement with Crusader [the RTO company], the evidence failed, as a matter of law, to prove beyond a reasonable doubt that appellant intended to defraud Crusader by failing to abide by the terms of the lease agreement.").

93. See Plaintiff's Memorandum in Opposition for Summary Judgment, *supra* note 70, at ¶ 17 (quoting and citing a TRS employee's sworn declaration regarding the payment schedule Ms. Edwards was required to follow).

94. To succeed on a claim of malicious prosecution, the plaintiff must prove, among other things, a showing that the defendant did not have probable cause to believe the plaintiff had committed a crime. See STUART M. SPEISER, AMERICAN LAW OF TORTS § 28:4 (2017 Update).

95. *Lashley v. Bowman*, 561 So. 2d 406, 407 (Fla. Dist. Ct. App. 1990).

96. *Id.*

97. *Id.*

98. *Id.* at 407–08.

99. *Id.* at 407, 409.

100. *Id.* at 408.

101. *Id.*

102. *Id.* at 407.

that “it’s never gone that far before, because when the police come, they always pay up and leave.”¹⁰³

Just like the restaurant owner in *Lashley*, TRS’s employees clearly used police officers to attempt to coerce Ms. Edwards into paying money or giving up the furniture.¹⁰⁴ Her saved recordings of the voicemail messages left by the TRS employees demonstrate that they initially made several threats to have her arrested in order to get Ms. Edwards to comply.¹⁰⁵ Also, the evidence at trial showed that the officers’ decision to arrest Ms. Edwards was based on employees’ statements falsely representing Ms. Edwards as refusing to make further payments.¹⁰⁶

The previously discussed *Umana* case is once again relevant because it dispels any notion that a defendant can avoid an extortion conviction by arguing that he or she believed a crime had been committed.¹⁰⁷ In that case, that defendant Langshaw claimed that she believed Jared had had raped her when she was a minor.¹⁰⁸ Therefore, she had a right to go the police department about this possible crime. The court held that, while Langshaw may have had the right to pursue statutory rape charges against Jared, she did not have the right to use the threat of criminal process as a means of collecting money on a potential civil claim against him.¹⁰⁹ “The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, *as held by all authorities*, contrary to public policy.”¹¹⁰

Like Langshaw in *Umana*, TRS’s employees repeatedly threatened to have Ms. Edwards charged with a crime in order to collect on a civil debt, not because they thought she had committed a crime.¹¹¹ If TRS’s employees had simply filed

103. *Id.*

104. See Amended Complaint, *supra* note 71, at ¶ 5.

105. *Id.* at ¶¶ 5–10. For example, an employee, who identified himself by name as the credit manager at TRS, left the following voicemail message: “I will get the authorities involved in this unless you call me and return my merchandise.” See Plaintiff’s Memorandum in Opposition for Summary Judgment, *supra* note 70, at 3. The employee further threatened: “I promise you, Janelle, I will be at the courthouse, at the DA’s office. I will file charges against you. And if that stuff is in your mom’s house, I will file charges on her for receiving stolen merchandise.” *Id.*

106. See Plaintiff’s Memorandum in Opposition to Motion for JNOV and for New Trial, *supra* note 84, at 2–3 (quoting the deposition testimony of the arresting officers, who indicated that the TRS employees failed to produce several letters written by Ms. Edwards where she asked TRS to accept her payment). TRS’s employees falsely accused Ms. Edwards of selling the furniture to her mother and left voicemail messages threatening to have the mother arrested for receiving stolen merchandise. *Id.* Their threats to falsely accuse Ms. Edwards and her mother of crimes constituted extortion under Oregon law. See OR. REV. STAT. § 163.275(1)(e) (making it a crime to compel or induce another person to engage in conduct from which the person has the legal right to abstain by causing the person to fear being falsely accused of committing a crime or causing criminal charges to be filed against the person).

107. See *People v. Umana*, 138 Cal. App. 4th 625, 640–42 (Cal. Ct. App. 2006).

108. See *id.* at 628–29.

109. See *id.*

110. *Id.* at 640–41 (emphasis added).

111. See generally General Judgment, *Edwards v. TRS Home Furnishings*, No. 0906-08151, 2010 WL 5412242 (Or. Cir. Oct. 4, 2010).

a police report and had not made any threats, extortion could not be established. But that is not what happened. TRS's filing of a police report came several weeks after TRS's employees had made repeated threats to have Ms. Edwards arrested and threats to send the police to her place of employment.¹¹² This conduct amounts to extortion.

III

CRIMINALIZATION VIA CREDITORS' ABUSE OF CIVIL CONTEMPT PROCESS

Rather than threatening and initiating criminal prosecution of consumers, some creditors engage in consumer debt criminalization by misusing the civil court system as a backdoor into the criminal justice system.¹¹³ Though civil contempt is technically a legitimate tool to use against debtors who fail to comply with court orders, payday lenders and other creditors misuse civil contempt when they have reason to believe that an oral examination is not likely to lead to the discovery of non-exempt assets that can be sold to pay civil debts. As demonstrated by the story of Wakita Shaw, this misuse induces in consumers a fear of being arrested for committing a crime, thereby coercing them into paying debts.

A. One Consumer's Trip To Jail For Civil Contempt

Ms. Shaw's road trip to jail started out innocently when she obtained a payday loan from Sunshine Title and Check Loan Company in St. Louis, Missouri.¹¹⁴ After Ms. Shaw failed to repay a \$425 loan, the payday lender obtained a default judgment against her and then filed the necessary documents that required Ms. Shaw to appear in court for an oral hearing.¹¹⁵ When she failed to appear, the lender then filed a civil contempt motion and eventually convinced a local judge to issue a body attachment order.¹¹⁶ This constituted a warrant for her arrest for failing to appear.¹¹⁷ Ms. Shaw was subsequently arrested.¹¹⁸ By then, the payday loan debt, including penalties and interest, had grown to \$855, but she was then obligated to post bail of \$1,250 to get out of jail.¹¹⁹ She was not allowed to use a

112. See Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at ¶¶ 13–14 (stating that Ms. Edwards suffered physical illness, including fainting, after being overwhelmed with terror by the thought of getting arrested by Oregon police over the RTO debt).

113. See, e.g., Chris Serres, *Debt Lockup*, 33 IRE J. 4, 4 (2010) (In a six-part series investigating debt-related lawsuits filed in Minnesota, the reporters found warrants issued in "3,200 debt-related cases since 2005, with the numbers of such cases soaring 60 percent in 2009.").

114. See Jim Gallagher, *Payday Lenders Use Courts To Create Modern Debtor's Prison*, ST. LOUIS POST-DISPATCH (Aug. 19, 2012), http://www.stltoday.com/business/local/payday-lenders-use-courts-to-create-modern-debtors-prison/article_f56ca6aa-e880-11e1-b154-0019bb30f31a.html [https://perma.cc/9VY2-W4M8].

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

bail bondsman. This meant she had to pay the full \$1,250 amount, instead of a fraction of that amount, to be released.¹²⁰ Desperate to get out of jail so that she could keep her job, Ms. Shaw, a single mother of a toddler, ended up spending three days in jail before her mother obtained the \$1,250 needed to secure Ms. Shaw's freedom.¹²¹

Ms. Shaw's story is not an isolated case. Missouri courts do not keep track of the number of body attachment orders issued in cases involving civil debts.¹²² However, Legal Services of Eastern Missouri found that one attorney who represents creditors requested fifty-five debtors to appear for oral examinations and had requested twenty-three body attachment orders in 2011 and 2012 alone, resulting in the arrests of seven people.¹²³ News stories and legal notices in Missouri and other states describe creditors obtaining civil contempt orders after debtors have failed to appear for an oral examination.¹²⁴

Like Missouri, every state has a post-judgment procedural process for creditors to invoke to try to satisfy a judgment.¹²⁵ That process may start with the creditor's request for the debtor to answer written interrogatories or appear at an oral examination.¹²⁶ Ostensibly, this post-judgment hearing allows a creditor to discover whether the debtor has assets to pay the judgment by allowing the creditor to ask questions and request documents and other information regarding assets.¹²⁷ If a debtor fails to appear, the creditor can then obtain a hearing to show cause in order to hold the debtor in civil contempt.¹²⁸ After the debtor fails to appear at the show-cause hearing, state statutes authorize the issuance of an arrest warrant (or body attachment in Missouri) allowing local police to arrest the debtor without any further opportunity to appear before the court.¹²⁹ The bail is usually set at an amount equal to or higher than the debt owed.¹³⁰ Once paid

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. In some communities, the local newspaper identifies individuals arrested on the basis of civil contempt for failing to appear in court. *See, e.g., Arrests*, DAILY REV. ATLAS (Monmouth, Ill.) (Sept. 2, 2015), 2015 WLNR 29323083 (reporting arrests of individuals residing in Warren County and adjacent counties). Investigative reporters have occasionally sifted through court filings and discovered that creditors are increasingly using the civil contempt process in debt-related cases. *See, e.g., Serres, supra* note 113.

125. *See, e.g.,* 5A COLO. PRAC., HANDBOOK ON CIVIL LITIGATION § 12:1, 2–3 (2015).

126. *See, e.g.,* JAMES J. BROWN, JUDGMENT ENFORCEMENT § 11.11 (3d ed. 2016) (stating that “[d]iscovery concerning a judgment debtor’s assets may be had by way of written interrogatories or through oral examination”).

127. *Id.* at 3.

128. *Id.*

129. *Id.*

130. *See, e.g.,* 6B Fed. Proc. Forms § 19:162 (“After the defendant is taken into custody, he or she may contest the issuance of the arrest order by challenging its legality or the defendant may post bond in an amount sufficient to insure the satisfaction of a judgment on plaintiff’s claim and thereby secure his or her release”).

by the consumer, it is turned over to the creditor.¹³¹ In some jurisdictions, like Missouri, the person must pay the full amount of the bail to be released.¹³² Moreover, because the consumer has not technically been charged with a crime, the consumer has no right to a court-appointed attorney.¹³³ Unsophisticated and unrepresented consumers are easily intimidated into finding a way to pay in order to get out of jail.

B. Creditor's Request For An Oral Examination Of The Debtor Is a Pretext To Achieving a Civil Contempt Order And Arrest Warrant

Without a lawyer, the typical consumer will not be able to determine whether creditors are intentionally misusing the civil contempt process. Most consumers do not file an answer to complaints involving debt collection and most do not appear in court to defend themselves.¹³⁴ This is because the majority of consumers cannot afford to hire a consumer lawyer to represent them.¹³⁵ Creditors, including

131. See, e.g., Kelly M. Greco & Stephanie R. Hammer, *No More 'Debtors' Prison': Greater Notice, Protections for Judgment Debtors*, 101 ILL. B.J. 134, 136 (2013) (discussing that prior to the 2012 changes in Illinois law, "when issuing a body attachment for failure to appear, judges [in Illinois] would often set the debtor's release bond at the amount of the debt and then turn the bond money over to the creditor"). Proving the legality or illegality of the money being immediately turned over to the creditor and not to the clerk of court is beyond the scope of this article. The point here is to show that creditors are incentivized to use the civil contempt process as a debt collection tactic if consumers find a way to pay, and the money is then immediately given to the creditors.

132. See *id.*

133. See, e.g., MO. SUP. CT. RULE 31.02(a) (describing when a person accused of a crime is entitled a court-appointed attorney). Wakita Shaw is a resident of St. Louis Missouri, which is not far from Ferguson, where Michael Brown, an unarmed African-American teen, was shot to death by a police officer. Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 98 (2015). Many issues came to light from civil protests about his death. *Id.* at 98. Relevant to this article was the practice among Ferguson police officers of issuing traffic citations to mostly African-American residents of Ferguson. *Id.* ("Investigations that sought to illuminate the causes and scope of community resentment and unrest in Ferguson revealed that a largely White police force issued numerous minor citations to the city's majority Black residents. Citations carried steep costs that would grow quickly over time if an individual did not pay promptly—such that a single ticket with a \$151 fine could balloon to a debt of more than \$1,000."). In a pending federal lawsuit against the Ferguson, the district court allowed the plaintiffs to go forward with their equal protection claim that the Ferguson violated their constitutional rights by incarcerating them over unpaid traffic fines but not assigning court-appointed counsel for the indigent plaintiffs. See *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1037 (E.D. Mo. 2015).

134. The fact that consumers do not respond to debt collection complaints is without controversy and that has been the case for decades. See, e.g., Letter from Donald S. Clark, Sec., Fed. Trade Comm'n to The Honorable Richard Cordray, Director, CFPB, (F.T.C. Feb. 12, 2016), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-practices-act-report-consumer-financial/160217cfpbreport2015fdcpa.pdf> [<https://perma.cc/NWC6-H4XT>].

135. See APRIL KUEHNHOFF & CHERIE CHING, *DEFUSING DEBT: A SURVEY OF DEBT-RELATED CIVIL LEGAL AID PROGRAMS IN THE UNITED STATES* (June 2016), http://www.nclc.org/images/pdf/debt_collection/debt-defense-survey-2016.pdf [<https://perma.cc/3CR3-2LRM>] (stating that the debt collection industry makes over a billion contacts with consumers annually and files lawsuits against millions and finding that companies obtain default judgments against consumers in the vast majority of those cases). The majority of consumers that seek free legal representation are turned away due to reduced funding available to legal aid organizations. *Id.* at 1. See also Debra Cassens Weiss, *Middle-Class*

debt collection companies, already know that in most consumer debt cases, they will obtain a default judgment.¹³⁶ Because the trajectory in consumer debt cases usually leads to a default judgment, some creditors have exploited the consumer's lack of response and sophistication to evade consumer protection laws in various ways, including by getting default judgments on time-barred debts¹³⁷ and using default judgments to unlawfully garnish consumers' wages.¹³⁸ This means the filing of a lawsuit in a consumer debt case yields low-hanging fruit, and sometimes that fruit is unlawfully obtained. Thus, unscrupulous creditors already have an incentive to use civil litigation to unlawfully collect debts from consumers.

Given that civil litigation is used against consumers to unlawfully collect debts, payday lenders and other high-cost lenders misuse civil contempt because they know or have reason to know that an oral examination is not likely to reveal assets that can lawfully be seized and sold. Therefore, the oral examination request is a pretext for reaching the ultimate goal of obtaining a civil contempt order and arrest warrant. Three main insights support this contention.

First, the high-cost lenders described in this article have established business models that extend exorbitantly priced credit to consumers who have no other options to satisfy their credit needs and are, therefore, financially vulnerable.¹³⁹

Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid, AM. B. ASS'N J. (July 22, 2010, 1:36 PM), http://www.abajournal.com/news/article/middleclass_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid (explaining why middle-class individuals cannot afford legal representation).

136. KUEHNHOFF & CHING, *supra* note 135, at 1.

137. See, e.g., *Diaz v. Portfolio Recovery Associates, LLC*, No. 10 Civ. 3920, 2012 WL 1882976, at *2 (E.D.N.Y. May 24, 2012) ("Defendants' filing of the [current lawsuit] was part of a 'policy and practice' whereby Defendants intentionally filed time-barred claims 'knowing that the vast majority of claims filed will result in default judgments or will be contested by unsophisticated pro-se consumers who are unaware of [state consumer protection law] and its impact upon the statute of limitations.'").

138. See, e.g., *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377 (1999) (holding that a bank's "long-arm program" constituted an abuse of process and an unlawful business practice where the bank filed lawsuits in Virginia courts against its out-of-state credit-card holders, obtained default judgments in more than ninety percent of the cases, and collected millions using Virginia's garnishment procedures to garnish the wages of out-of-state cardholders).

139. For instance, the crux of the payday lending business model is to lend money to credit-challenged consumers who need cash to pay a bill and who lack any other viable options to solve their financial crisis. See generally Nathalie Martin & Ernesto Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY. CONSUMER L. REV. 524 (2012). Furthermore, car title lenders, RTO companies, and other high-cost lenders extend credit to cash-strapped consumers with bad credit. *Id.* Women and minorities are disproportionately represented among payday loan borrowers, RTO customers, and car title borrowers. See, e.g., *id.*; Kathryn Fritzdixon et al., *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1029 (2014) (reporting findings of a study, and specifically finding "women are slightly more likely than men to use auto title loans" and that this finding is similar to demographic data showing that "[w]omen are also more likely to use payday loans, pawnshops, and rent-to-own services"). Evidence suggests that women and minorities are specifically targeted by predatory lenders. See, e.g., Jim Hawkins, *Are Bigger Companies Better for Low-Income Borrowers?: Evidence from Payday and Title Loan Advertisements*, 11 J.L. ECON. & POL'Y 303, 325 (2015) (reporting the results of the author's study of advertisements by payday and car title lenders and finding "[l]arge companies are more likely to have storefront advertisements aimed at racial minorities than small companies at a statistically significant level, and large companies are more likely to have websites dominated by pictures of racial minorities").

All of these companies charge triple-digit (or higher) interest rates and impose loan repayment terms that make it likely that consumers will default and will enter into long-term cycles of indebtedness¹⁴⁰ or lose possession of their assets.¹⁴¹ As a result, these high-cost lenders are subject to state and federal regulations to curb their lending practices and are targeted in pending federal regulations announced by the CFPB.¹⁴²

Second, financial data revealed about consumers who rely on high-cost consumer credit further highlights the pretextual nature of requests for oral examinations. In comparison to individuals who do not obtain high-cost loans, consumers that use the high-cost forms of consumer credit have lower income, lack savings, and have less wealth (for instance, they are not likely to be homeowners).¹⁴³ Because consumers who obtain exorbitantly priced loans have less income, garnishment of their wages by creditors may result in smaller payments over time from the consumer's income. This is because applicable

140. See, e.g., CONSUMER FIN. PROT. BUREAU, SUPPLEMENTAL FINDINGS ON PAYDAY, PAYDAY INSTALLMENT, AND VEHICLE TITLE LOANS, AND DEPOSIT ADVANCE PRODUCTS 111 (2016), http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf [<https://perma.cc/CLR3-8ZDH>] [hereinafter CFPB's 2016 SUPPLEMENTAL FINDINGS] (reporting results from data collection that included over twelve million payday loans issued in thirty states within a twelve-month period and finding that "[o]ver 80% of payday loans are reborrowed within 14 days from the same lender, 85% are reborrowed within 30 days, and 88% are reborrowed within 60 days"); Ann Constable, *Judge Orders FastBucks to Pay Restitution to Borrowers*, SANTA FE NEW MEXICAN (Sept. 27, 2012), http://www.santafenewmexican.com/news/local_news/judge-orders-fastbucks-to-pay-restitution-to-borrowers/article_01fea39d-4be3-5eb8-80fc-f2b8efcbd057.html [<https://perma.cc/88E2-SY3F>] (announcing a victory by the New Mexico Attorney General in a case it filed against FastBucks, a payday lender that issued "installment" loans to take advantage of consumers to keep them in long-term debt and describing the testimony of one FastBucks employee who stated: "[w]e just basically don't let anybody pay off [a loan]"). See also Decision and Final Order, *New Mexico v. Fastbucks Holding Corp.*, No. D0101-CV-2009-01917, at ¶ 15 (N.M. Sept. 26, 2012), <http://www.creditslips.org/files/fastbucks-decision-1.pdf> [<https://perma.cc/55UG-VQ93>] ("Given borrowers' financial conditions, it was knowable *ab initio* that they would be unable to repay their loans without accruing exorbitant interest.").

141. See, e.g., Default Judgment and Final Order for Permanent Injunction, *Schuette vs. Liquidation, LLC*, No. 16-30-CP, at 5, (June 8, 2016) https://web.archive.org/web/20170416170156/http://www.michigan.gov/documents/ag/6_8_16_Filed_Default_Judgment_Final_Order_for_Permanent_Injunction_526342_7.pdf (enjoining car title lenders, which were not licensed to do business in Michigan, from operating in the state and finding that they had unlawfully repossessed at least 154 vehicles from Michigan residents).

142. In June of 2016, the CFPB proposed new rules to curb the abuses of payday loans, auto title loans, and other forms of short-term credit. *CFPB Proposal Looks to End Payday Loan Debt Traps*, FED. BANKING L. REP. ¶¶ 154-379 (June 2, 2016); Payday, Vehicle Title, and Certain High-Cost Installment Loans (proposed June 2, 2016) (to be codified at 12 C.F.R. pt. 1041), http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf [<https://perma.cc/76PH-4V5P>] [hereinafter CFPB's Proposed Rules].

143. For an in-depth discussion of the financial data about payday and car title loan borrowers, see Nathalie Martin & Ernesto Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY. CONSUMER L. REV. 524 (2012). See also *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 999 n.1 (9th Cir. 2010) ("The payday industry targets low to medium income consumers as well as individuals who have no savings, and live paycheck to paycheck."); Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2066 (2008) (stating that consumers who enter into RTO contracts with the intent to own are less likely to have household incomes greater than \$25,000, are less likely to own their homes, and more likely to lack a high school diploma).

federal and state laws protect the majority (usually seventy-five percent) of a consumer's disposable income from attachment.¹⁴⁴

In addition to earning less income, consumers who use high-cost credit disproportionately receive part or all of their income from sources that are exempted from attachment under federal or state law.¹⁴⁵ For example, various state and federal laws protect child support payments, disability income, Social Security income, and similar types of income sources.¹⁴⁶ As a result, a garnishment proceeding may yield nothing.¹⁴⁷ This may explain why some high-cost lenders do not even attempt to directly garnish a consumer's source of income before resorting to civil contempt proceedings.

Although laws explicitly protect numerous sources of income, Professor Lea Shepard and others have found that consumers facing arrest or wanting release from jail may use exempted income sources to pay the amount that the creditor claim is owed.¹⁴⁸ As a result, creditors that misuse the civil contempt process circumvent exemption laws by using arrest warrants to coerce consumers into paying with the same funds that are ostensibly protected by law.

Third, consumers who borrow from high-cost lenders are likely to have tangible assets (e.g., furniture) protected under personal property exemption laws and, therefore, lack assets that a creditor can seize and sell.¹⁴⁹ Financial data

144. See, e.g., John Terrill & Jennifer Kosteva, *Asset Protection Planning: Understanding the Links and the Conflicts Between Estate Planning and Debtor/Creditor Law*, AM. L. INST. 711 (describing personal property and income exemption laws in the United States, and stating that, for example, Georgia law allows a creditor to garnish from disposable earnings “the lesser of (i) twenty-five percent of weekly after-tax earnings and (ii) the amount by which after-tax weekly income exceeds thirty times the federal minimum hourly wage”).

145. See, e.g., CFPB DATA POINT: PAYDAY LENDING, CFPB OFF. RES. (Mar. 2014), http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf [https://perma.cc/9396-DS7Q] (reporting data that shows, among other things, that the majority of borrowers who are paid monthly receive income from governmental benefits, such as Social Security payments and Supplemental Security Income (SSI)).

146. See, e.g., 42 U.S.C. § 407(a) (2010) (“The right of any person to any future [Social Security] payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”).

147. See, e.g., *Philpott v. Essex Cty. Welfare Bd.*, 409 U.S. 413, 417 (1973) (explaining that the wording in § 407 “imposes a broad bar against the use of any legal process to reach all social security benefits [and] [t]hat is broad enough to include all claimants, including a State”).

148. See, e.g., Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1536 (2011); Brief For AARP as Amicus Curiae Supporting Respondents, *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1101–02 (6th Cir. 2015), cert. granted *sub nom* Sheriff v. Gillie, 193 L. Ed. 495 (U.S. Dec. 12, 2015) (No. 15-338), available at 2016 WL 878848 (describing how debt collectors threaten to have elderly consumers arrested and threaten to seize their Social Security checks and explaining the vulnerability of elderly consumers that may lead them to pay the amount demanded, even when they do not owe it, to avoid being arrested).

149. Every state has exemption laws that protect a certain amount of personal property, and all or part of the value of the debtor's primary residence, from being seized and sold by unsecured creditors seeking satisfaction of consumer debts. Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but “Uniform,”* 29 AM. BANKR. INST. J. 1, 1 (2011). In addition to state

indicates that consumers who obtain high-cost loans lack savings and have fewer assets, including lacking ownership of a home. If the consumer who borrowed money from a high-cost lender has no savings in the bank, does not own a house, and lacks a car (or the car is encumbered by a perfected security interest), then the odds are very high that the consumer's remaining personal assets are comparatively worth little and will be protected under state exemption laws.¹⁵⁰ Lawyers who regularly represent creditors in consumer cases should already know this.¹⁵¹ That is precisely why experienced lawyers recommend that any attorney representing a creditor first investigate the availability of non-exempt assets before filing a lawsuit against the debtor.¹⁵²

The news report about Ms. Shaw revealed a disturbing track record of one lawyer, Mitchell Jacobs, who regularly represents payday lenders and other creditors and requests oral examinations.¹⁵³ In one year, he had summoned dozens of consumers to appear for oral examinations and, due to the failure of some to appear, had requested twenty-three body attachment orders (or arrest warrants), which resulted in the arrests of seven consumers.¹⁵⁴ When Mr. Jacobs was questioned about his practices, he stated: "If they've had notice and they fail to appear, then they get what they deserve."¹⁵⁵ His answer does not indicate these consumers had non-exempt assets but refused to appear. His track record should be cause for concern about the misuse of civil contempt because it puts extreme

law, various federal laws provide consumers with a variety of exemptions. *See, e.g.*, ROSEMARY E. WILLIAMS, 1 BANKRUPTCY PRACTICE HANDBOOK § 2:9 n.26 (2d ed. & 2016 Update) (identifying several exempt property interests, such as payments to winners of the congressional Medal of Honor, that are available under federal laws and that are not dependent on a person filing bankruptcy).

150. The majority of Americans have personal property items that fall within exemption limits and, therefore, cannot be seized by unsecured creditors. Moreover, the vast majority of Chapter 7 bankruptcy cases are labeled as no-asset cases, which means unsecured creditors receive nothing because there are no assets available to be taken and sold for payment of their debts. *See In re Plourde*, 418 B.R. 495 (B.A.P. 1st Cir. 2009) (citing data and stating that in the few Chapter 7 cases where assets exist, unsecured creditors receive only partial payment of their debts).

151. I spent most of my private practice representing creditors. I was trained to first determine whether the debtor had non-exempt assets and make sure they were not subject to a pre-existing lien or a security interest. It was considered unethical to drive up legal fees by filing lawsuits unless we could determine the debtor had unencumbered, non-exempt assets to satisfy any potential judgment. At the very least, we were expected to verify whether such assets existed in order to retain our clients and avoid any potential malpractice lawsuits. Simply obtaining the consumer's credit report would indicate if the consumer has a home subject to a mortgage or a car subject to a security interest. For the majority of consumers, these two assets are the most valuable and if they are already subject to pre-existing perfected liens, then a judgment creditor, such as a payday lender, has no reason to believe that valuable non-exempt assets exist to satisfy its judgment.

152. "Creditor's counsel should try to discover what property the debtor has that can be levied upon . . . , whether such property is subject to liens or encumbrances, and whether there are other judgments against the debtor." *Evaluating the Claim*, CAL. PRAC. GUIDE ENF. J. & DEBT 3-A (2016) (describing the steps in conducting an investigation of the debtor's assets and stating that "an investigation should usually be completed before a creditor decides whether to bring suit against an uncooperative debtor").

153. Gallagher, *supra* note 114.

154. *Id.*

155. *Id.*

pressure on consumers to come up with the money demanded. For example, Wakita Shaw's mother borrowed from someone else to get Ms. Shaw out of jail.¹⁵⁶

As the late Paul Harvey would say, "here's the rest of the story"¹⁵⁷ about Wakita Shaw, which shows the payday lender's oral examination request would not have led to the discovery of non-exempt assets. Perhaps predictably, a few months after getting out of jail, Ms. Shaw ended up filing bankruptcy to get a fresh start from her indebtedness.¹⁵⁸ Her bankruptcy petition revealed this mother of a toddler received part of her income from child support payments—an exempted source of income that the payday lender could not have garnished.¹⁵⁹ The petition also revealed that she did not own a home, and she did not have any collectible assets because all of her personal property was protected by exemption laws or subject to security interests.¹⁶⁰ The bottom line is that she did not have any personal property that the payday lender could have seized and sold. Consequently, one can reasonably conclude the civil contempt process is exploited by the payday lender to force consumers to get money from someone else to pay the civil debts owed. Practice-oriented articles even advise lawyers that they will accomplish receipt of payment from the debtor by following through on the civil contempt process.¹⁶¹ This paints a picture of extortion. Therefore, it is time for prosecutors to consider going after creditors that misuse civil contempt.

C. Creditors' Abuse Of Civil Contempt Constitutes Extortion

When lenders misuse the civil contempt process, they commit extortion because the process constitutes an implied threat that consumers will be prosecuted for committing a crime.¹⁶² Once again, the *Umana*¹⁶³ case is relevant because Langshaw argued that her letter, which demanded weekly payments totaling \$50,000, was merely an attempt to settle a legitimate civil claim against the man she believed had raped her.¹⁶⁴ Although Langshaw's letter stated that she "would like to settle this matter," the court held that, in light of her conduct

156. *Id.*

157. Mr. Harvey was a legendary syndicated radio columnist who hosted a program called "The Rest of the Story" in which he uncovered and delved in little-known facts behind stories. *See generally*, PAUL HARVEY, JR., PAUL HARVEY'S THE REST OF THE STORY (1977).

158. Wakita Shaw, Petition, Case No. 12-50325, (Bankr. E.D. Mo. Oct. 25, 2012).

159. *Id.* Sch. I.

160. *Id.* Schs. A, B & D. Her vehicle was subject to a car title loan. *Id.* Even her daughter's bedroom set was subject to a security interest. *Id.*

161. *See, e.g.*, Ronald S. Carter, *Collection of Contract Debts*, MD. INST. FOR CONTINUING PROF'L EDUC. LAW., INC. (2012) ("If the debtor again fails to appear for the show cause hearing [regarding the civil contempt], then file for a body attachment. Body attachments are usually rather effective, as most debtors do not like to be imprisoned and suddenly find funds for bonds.").

162. States have criminal extortion statutes that define a threat to accuse someone of a crime as unlawful. *See, e.g.*, CAL. PENAL CODE § 519(2) (2015).

163. *People v. Umana*, 138 Cal. App. 4th 625 (Cal. Ct. App. 2006).

164. *Id.* at 639.

and the entire letter, her letter threatened “to continue accusing the victim of crime.” Consequently, Langshaw had “the specific intent to extort money and other property from him.”¹⁶⁵

Applying the *Umana* to the payday lender’s treatment of Wakita Shaw, a court could conclude that the payday lender committed extortion. Lawfully initiating the civil contempt process does not shield the lender from an extortion conviction.¹⁶⁶ The news report about Ms. Shaw is silent about her communications with the lender between the time of her arrest and her release from jail. After being arrested, either Ms. Shaw or her mother probably tried to contact the lender’s lawyer to find a way for Ms. Shaw to be released from jail.¹⁶⁷ If the lawyer communicated with Ms. Shaw (or with her mother) any words implying that Ms. Shaw would be released if she paid the debt, then a fact finder could conclude beyond a reasonable doubt that the lender, through its lawyer, made an implicit threat to continue criminal action against Ms. Shaw until she paid the debt.¹⁶⁸

Regardless of the communications, the creditor’s misuse of civil contempt created the impression in Ms. Shaw’s mind that she was being arrested for failing to pay back a loan, not for failing to appear in court. Without legal training, consumers believe they are being arrested for committing a crime related to the unpaid debt.¹⁶⁹ That belief is justified by the consumer looking at the style or caption of the written body attachment order because it will have the same heading as in the initial complaint filed against the consumer.¹⁷⁰ If shown the written order from the court, the lender’s name will still be listed as the plaintiff and the consumer’s name will still be listed as the defendant.

The consumer’s belief that the arrest is due to an unpaid debt is further cemented by the fact that once the consumer pays the bail amount, which is

165. *Id.*

166. The *Umana* case demonstrates that a defendant cannot avoid an extortion conviction just because the defendant claims to rely on our civil system of resolving disputes. *See, e.g., id.* at 640–41.

167. I base this assertion on my law practice experience, which consisted primarily of representing creditors in state-court collection cases and in bankruptcy cases. It was a common occurrence for a consumer–debtor to contact me once they had been served with a complaint. I would then tell the consumer that I represented the creditor and could not give him or her legal advice. I would instruct the consumer to retain his or her own attorney. Unfortunately, it is incontrovertible that the majority of Americans do not have access to free or low-cost legal advice. *See supra* notes 135–136 and accompanying text. For a summer, I worked as attorney at Neighborhood Legal Services Association where I encountered clients, most of whom were not competent by themselves to deal with a creditor’s attorney.

168. Although this article does not contend that lawyers should be criminally prosecuted, lawyers have been convicted of extortion on various grounds, including making threats to accuse a client’s customer of a crime. *See, e.g., People v. Beggs*, 172 P. 152, 153 (Cal. 1918).

169. *See, e.g., Shepard, supra* note 148, at 1536. In her article describing the use of civil contempt as a debt collection mechanism, Professor Lea Shepard explains numerous reasons why debtors fail to appear. A primary reason is the consumer lacks understanding of the implication of failing to appear. *Id.* (stating also that “[i]n the area of debt collection, debtors’ lack of sophistication is reflected, among other things, in their unfamiliarity with their state and federal exemption rights”).

170. *See, e.g., Judgment Ordering Body Attachment*, 1A Fla. Pl. & Pr. Forms § 6:172.

turned over to the creditor, the consumer is released from jail.¹⁷¹ As Professor Alan White explained, “[i]f, in effect, people are being incarcerated until they pay bail, and bail is being used to pay their debts, then they’re being incarcerated to pay their debts.”¹⁷² Then, according to the holding of *Umana*, neither the lender nor its lawyer needed to explicitly accuse Ms. Shaw of committing a crime.

Another recent case supports the conclusion that the payday lender could be convicted of extortion absent direct threats. In *People v. Bollaert*, the defendant operated a website, UGotPosted.com, through which users could post naked and intimate photographs of individuals, along with their names, locations, and social media profile links.¹⁷³ Individuals who wanted their pictures removed were directed to another Bollaert website, ChangeMyReputation.com, where they could pay a fee to have the offensive content removed from the other website.¹⁷⁴ Bollaert was charged with several crimes, including extortion, and eventually convicted of extortion based on the threat to expose the secrets of individuals and subject them to disgrace (namely, shame and humiliation).¹⁷⁵

Bollaert challenged the extortion conviction on the basis that he did not initiate any direct communications to any individuals or make any threats to those who wanted the offensive content removed.¹⁷⁶ The court rejected this argument and found an implicit threat from the fact that the offensive content would not be removed unless the victims paid.¹⁷⁷ Bollaert’s actions had already taken away (or at least invaded) the victims’ privacy and constituted an implicit threat to subject them to continued disgrace, embarrassment, and humiliation by keeping the intimate photos on his website if they failed to pay the required fee.¹⁷⁸

Similar to the *Bollaert* case, an implicit threat can be found in the fact that the payday lender, via its lawyer, had already taken Ms. Shaw’s freedom by having her arrested over a civil debt and that she could only be freed if she paid what was demanded. According to the reasoning in the *Bollaert* decision, neither the

171. See, e.g., Gallagher, *supra* note 114.

172. Chris Serres, *Debtors and the New Breed of Collectors: Is Jailing Debtors the Same as Debtors’ Jail?*, STAR TRIB., June 6, 2010, at A9.

173. *People v. Bollaert*, 203 Cal. Rptr. 3d 814 (Cal. Ct. App. 2016). This type of website is commonly referred to as a “revenge porn” website where jilted ex-spouses and lovers can shame their exes by posting nude or similar photos of them online. See Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 775 (2017).

174. *Bollaert*, 203 Cal. Rptr. 3d at 819.

175. Besides inducing fear based on a threat to accuse someone of crime, as was the case in *Umana*, California law also states that extortion includes inducing fear by a threat “[t]o expose, or impute to [a person] . . . a deformity, disgrace, or crime” or “expose a secret affecting him [or her].” CAL. PENAL CODE § 519.

176. *Bollaert*, 203 Cal. Rptr. 3d at 820.

177. *Id.* at 837 (“The fact Bollaert did not take affirmative action to seek out or contact the victims, but merely responded to the victims’ pleas to remove their content, does not render the threat element unsupported by the evidence.”).

178. *Id.* (“There is no question based on the victims’ testimony that the display of their private images and information subjected them to shame, disgrace and embarrassment as to their reputation and character, and would continue to be exposed to other people if the content was not removed”).

lender nor its lawyer needed to initiate contact with Ms. Shaw after her arrest. Similar to the victims in *Bollaert* who had already been subjected to humiliation, Ms. Shaw was already sitting in jail, ostensibly for committing a crime due the lender's misuse of civil contempt. Because jail is for those accused of crimes, it was reasonable for Ms. Shaw to infer that she had been accused of a crime and that the lender would continue accusing her of a crime related to the payday loan debt. She could only get out of jail by heeding the demands of the payday lender to pay. That amounts to extortion.

D. Creditors Cannot Hide Behind Their Technically Legal Use Of Civil Contempt Or Their Belief That The Consumer Owed a Debt

Creditors may contend that because the civil contempt process is legal, they do not have the requisite intent to commit a crime. But in numerous contexts, courts have held that asserting a claim of right can nevertheless constitute extortion when it is used to get money or other property from the victim. For instance, in *Roberts v. State*, a Texas appellate court upheld the conviction of a defendant who claimed that he was relying on a civil rule when he asked for a settlement of potential claims.¹⁷⁹ The defendant, Ted Roberts, sent drafts of discovery petitions to four men that had had sexual affairs with his wife.¹⁸⁰ Under Texas' rules of civil procedure, before filing a lawsuit, a person can file a petition to obtain a discovery order to allow that person to obtain deposition testimony from someone else.¹⁸¹ The purpose of this pre-lawsuit discovery rule is to "to perpetuate the testimony of witnesses for use in an anticipated suit" and "to investigate a potential claim or suit."¹⁸² In the petitions, Roberts requested the court's permission to investigate potential claims and highlighted various sections of the Texas Penal Code.¹⁸³ He asked the four men to settle his potential claims against them by either paying him directly or sending money to his favorite charity.¹⁸⁴ All four paid the amount requested and signed agreements to settle Roberts' claims against them.¹⁸⁵ Roberts was eventually convicted of two crimes, one constituting theft by coercion.¹⁸⁶

179. *Roberts v. State*, 278 S.W.3d 778 (Tex. App. 2008).

180. *Id.* at 783–84.

181. TEX. R. CIV. PROC. 202.1(b) ("A person may petition the court for an order authorizing the taking of a deposition or oral examination or written questions . . . to investigate a potential claim or suit.").

182. KNOX D. NUNNALLY & RONALD G. FRANKLIN, 3 TEXAS PRACTICE GUIDE TORTS § 12:122 (2016 Update).

183. *Roberts*, 278 S.W.3d at 785.

184. *Id.* at 784–87.

185. *Id.* at 785–88.

186. *Id.* at 790. Under Texas law, a person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a) (2015). The appropriation of property is "unlawful" when it is without the owner's effective consent. TEX. PENAL CODE § 31.03(b) (2015). Consent is lacking if obtained by coercion, which includes threats to accuse a person of an offense or expose the person to ridicule or contempt. TEX. PENAL CODE § 1.07(a)(9)(C)–(D) (2011).

Under Texas law, threats amounting to coercion include threats “to accuse a person of any offense,” to “expose a person to hatred, contempt or ridicule,” or to “harm the credit or business repute of any person.”¹⁸⁷ The court concluded that the testimonies of Roberts’ victims were sufficient to support his conviction for making those threats.¹⁸⁸ For example, one man testified that he believed the petition draft Roberts gave to him was a threat to accuse him of various crimes arising from his affair with Roberts’ wife.¹⁸⁹ Another victim testified that he settled because he believed the petition, if filed, “would be embarrassing,” “would cause people to lose confidence in him,” and would cause him to lose his job.¹⁹⁰ Therefore, the court held that a jury could find beyond a reasonable doubt that Roberts used coercion to obtain the settlements, and that his use of the discovery petitions was “not based on his reliance on the validity of his legal claims but in an effort to threaten and deceive the men.”¹⁹¹

Likewise, a jury could find beyond a reasonable doubt that a lender’s use of the civil contempt process is employed to obtain an arrest warrant to coerce consumers into paying out of fear of being charged with a crime if they do not pay. Although one of the victims in *Roberts* thought he was being accused of crime, most people know that committing adultery is not a crime in the United States.¹⁹² However, consumers who are arrested via civil contempt have every reason to believe they are being accused of a crime. If they are told they can be released if they pay in full, that information would confirm their perception that they have been accused of a crime arising from the unpaid civil debt. Consequently, creditors cannot escape an extortion conviction simply by asserting that they legally used civil contempt to have consumers arrested.

Similarly, creditors cannot avoid an extortion conviction by asserting as a defense the fact that the victim owed a valid debt. In *People v. Fichtner*,¹⁹³ the court upheld the convictions of two defendants who threatened to have a person prosecuted for shoplifting after he had stolen food items.¹⁹⁴ After the defendants made several demands, the accused shoplifter signed an agreement requiring restitution by immediately paying \$25 to the defendants and promising to pay the remaining debt balance in installments.¹⁹⁵ Appealing their convictions, the defendants argued that the jury should have been instructed not to convict if the

187. TEX. PENAL CODE § 1.07(a)(9)(C)–(E) (2011).

188. *Roberts*, 278 S.W.3d at 793.

189. *Id.*

190. *Id.*

191. *Id.* at 794.

192. Adultery is still a crime in some countries. See, e.g., Carlin Moore et al., *International Legal Updates*, 16 HUM. RTS. BRIEF 36, 41 (2009) (stating that Iran had executed individuals for various crimes, including adultery).

193. *People v. Fichtner*, 118 N.Y.S.2d 392 (N.Y. App. Div. 1952).

194. *Id.* at 394, 399.

195. *Id.* at 394.

defendants honestly believed the victim owed the money.¹⁹⁶ The court disagreed and held that such a jury instruction would be incorrect under the law.¹⁹⁷ The bottom line is that public policy condemns the means by which these defendants choose to collect debts.¹⁹⁸

In accordance with the reasoning of *People v. Fichtner*, creditors that misuse civil contempt cannot escape extortion convictions because this collection practice contravenes public policy as it terrorizes consumers into paying civil debts. Likewise, creditors that initiate criminal charges, or that only threaten to do so, should not be able to avoid extortion convictions because these practices constitute unlawful collection methods that violate public policy, even when civil debts are legitimately owed.

196. *Id.* at 396.

197. “[D]efendants may properly be convicted even though they believed that the complainant was guilty of the theft of their employer’s goods in an amount either equal to or less, or greater than any sum of money obtained from the complainant.” *Id.* Some courts require that the defendant’s threat amount to doing something unlawful (for example, threatening to kill the victim unless she pays or taking money not owed by the victim). *See, e.g., United States v. Vigil*, 478 F. Supp. 2d 1285, 1305 (D.N.M. 2007) (“The Court concludes that the term ‘wrongful’ applies when a defendant attempts to extort property to which he has no lawful claim—irrespective of the extortion method employed.”). And many scholars argue for this standard. *See* Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 556 (2005) (conceding that the federal extortion statute “does not explicitly require that the defendant threaten to do an ‘unlawful’ act” but arguing that the term “wrongfulness” in the statute should be interpreted to mean “unlawfulness”). To the extent case law interprets extortion statutes to require such a showing of unlawfulness, state lawmakers need to amend those statutes to make it clear that even threats to do something lawful amount to extortion if done to induce fear in the victim in order to coerce a payment from the victim. *See generally* Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1065 (2007) (stating that laws prohibiting extortive threats exist to protect individuals from “undue fear and anxiety”).

198. *Fichtner*, 118 N.Y.S.2d at 396. Courts have consistently held that the law denounces the means by which payment is sought. *See, e.g., Garcia v. Garcia*, 81 F.3d 95, 97 (9th Cir. 1996) (California law) (holding that it is the “means employed which the law denounces” as extortion even if the defendant was motivated to collect a just debt); *Rael v. Sullivan*, 918 F.2d 874, 876 (10th Cir. 1990) (New Mexico law) (upholding defendant’s extortion conviction because that phrase “to wrongfully compel” refers to the threats he used to compel action from the victim and not to “the legitimacy of the defendant’s objective”); *United States v. Zappola*, 523 F. Supp. 362, 366 (S.D.N.Y. 1981), *aff’d*, 677 F.2d 264 (2d Cir. 1982) (federal law) (analyzing federal extortion statute under the Hobbs Act and holding that where the threats used to obtain the money are “explicitly and unequivocally proscribed by the relevant statutes,” the defendant cannot escape conviction because he believed in the validity of the debt owed by the victim); *Moore v. Newell*, 401 F. Supp. 1018, 1020–21 (E.D. Tenn. 1975), *aff’d*, 548 F.2d 671 (6th Cir. 1977) (upholding extortion conviction for making non-violent threats and stating that the “statute concerns the method by which a payment is sought”); *Commonwealth v. Cohen*, 921 N.E.2d 906, 932 n.46 (Mass. 2010) (Massachusetts law) (holding that a threat made to enforce payment of a “just debt” is still extortion).

IV

CRIMINALIZATION TACTICS CIRCUMVENT STATE CONSTITUTIONAL
PROHIBITIONS ON INCARCERATION FOR CIVIL DEBTS AND CONSUMER
PROTECTION LAWS

Creditors that employ consumer debt criminalization practices are not just committing extortion, they are also violating state constitutions that prohibit incarcerating individuals for failure to pay civil debts.¹⁹⁹ In addition, some states have laws that specifically prohibit creditors from threatening to have consumers arrested.²⁰⁰ Thus, if prosecutors let creditors get away with extorting consumers by using criminalization tactics, prosecutors will, in essence, allow creditors to violate consumers' constitutional and statutory rights to live free from the terror of being arrested over civil debts.

A. Most State Constitutions In Theory Protect Consumers From
Criminalization

Most states have constitutional provisions that ban incarceration of individuals for civil debts or severely limit the instances in which incarceration is permitted.²⁰¹ Once again, Wakita Shaw's case provides a poignant illustration of how creditors can evade a state's constitutional protection of its citizens. Ms. Shaw is resident of Missouri, which has the following constitutional provision: "no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law."²⁰² Missouri case law holds that this constitutional ban

199. See, e.g., ARK. CONST. art. II, § 16 ("No person shall be imprisoned for debt in any civil action, or mesne or final process, unless in cases of fraud."); CAL. CONST. art. I, § 10 ("A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine."); OHIO CONST., art. 1, § 15 (same as Arkansas' constitution).

200. See, e.g., CAL. CIV. CODE § 1788.10(e) (California law prohibits a "threat to any person that nonpayment of the consumer debt may result in the arrest of the debtor or the seizure, garnishment, attachment or sale of any property . . . , unless such action is in fact contemplated by the debt collector and permitted by law."); IOWA CODE ANN. § 537.7103(1)(e) (prohibiting the making of a "false threat that nonpayment of a debt may result in the arrest of a person or the seizure, garnishment, attachment or sale of property or wages of that person"); TEX. FIN. CODE § 392.301(a)(5) (Under Texas law, "debt collector[s] may not use threats, coercion, or attempts to coerce" that involve "threatening that the debtor will be arrested for nonpayment of a consumer debt without proper court proceedings."); WASH. REVISED CODE ANN. § 19.16.250(13) (banning several collection practices, including attempting to collect from the debtor by using "threats of force or violence," and "threats of criminal prosecution"). These state law prohibitions are similar to the federal prohibition under the Fair Debt Collection Practices Act. See 15 U.S.C. § 1692e(4) (2006) (prohibiting debt collectors from making "[t]he representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action").

201. For a comprehensive list of states that either ban or limit incarceration of individuals over civil debts, see Christopher Hampson, Appendix, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016), http://cdn.harvardlawreview.org/wp-content/uploads/2015/11/vol129_Note1024Appendix.pdf [<https://perma.cc/LXC6-SD5X>] (identifying and quoting text from forty-one state constitutions that ban or substantially limit incarceration).

202. MO. CONST. art. I, § 11.

on imprisonment applies to contractual debts; that is, money due directly under a contract, as well as to judgment debts arising from litigation over unpaid contractual debts.²⁰³

In a case involving a debtor's default on a promissory note given in exchange for money lent, the Missouri Court of Appeals made it clear that the debt came within the purview of the constitutional prohibition.²⁰⁴ In *Estate of Downs*, the creditor's estate sued and obtained a judgment against the debtor.²⁰⁵ After the estate's attempt to garnish the debtor's assets yielded nothing, the estate moved the probate court for a civil contempt order against the debtor for failure to pay the judgment debt.²⁰⁶ The estate argued that the debtor was in contempt for failing to pay a specific fund of money,²⁰⁷ and the contempt order was, therefore, permissible under the constitution. This argument was implausible because the estate had already tried unsuccessfully to reach that specific fund in a prior garnishment proceeding.²⁰⁸ The Missouri Court of Appeals saw the estate's use of civil contempt for what it really was—an attempt to get around the constitution and case law holding that the constitutional ban applies to attempts to collect debts arising from litigation over unpaid contractual debts.²⁰⁹ Because the estate knew that the debtor was no longer in possession of the specific funds, the civil contempt order and subsequent body attachment resulting in the debtor's imprisonment violated the Missouri constitution.²¹⁰

Like the creditor in *Estate of Downs*, the payday lender can raise a similar technical distinction—Ms. Shaw was arrested for failing to appear, not for failing to pay. The reality, however, is that the lender had no reason to believe Ms. Shaw had money or assets that could be used to pay the debt but simply refused to appear for the oral examination. The lender used the civil contempt process to force a payment, not a court appearance. Moreover, the data demonstrates that payday lenders and other high-cost lenders profit from extending credit to consumers who have no money to meet their financial obligations, which is why

203. See, e.g., *In re Estate of Downs*, 300 S.W.3d 242 (Mo. Ct. App. 2009).

204. See, e.g., *id.*

205. *Id.* at 244.

206. *Id.* 245.

207. See *id.* at 248.

208. *Id.* The fund could not be reached because it was no longer in the possession or control of the debtor. *Id.*

209. Missouri case law holds that it is permissible under the state constitution to order the judgment debtor to turnover a specific fund containing money. *Id.*

210. The court stated in relevant part:

[I]t is undisputed that [the debtor] cannot return those specific funds because he no longer has that fund in his possession . . . Thus, the trial court's order held [the debtor] in contempt for failing to repay money from his own resources to satisfy an obligation that arose from a consensual transaction between a creditor and a debtor. This is the definition of a debt for the purposes of the constitutional provision against imprisonment for debts. The trial court's order imprisoning [the debtor] for failing to repay the promissory note violates Missouri's constitutional prohibition against imprisonment for debts.

Id. at 248.

they come to these high-cost lenders in the first place.²¹¹ Therefore, high-cost lenders should not be able evade constitutional protections by misusing civil contempt or filing police reports²¹² to initiate the arrest of consumers who are unable to pay civil debts.²¹³

B. Creditors Are Evading Consumer Protection Laws That Ban Criminalization Of Consumers Who Cannot Pay

Besides skirting state constitutions, creditors that use criminalization tactics are also evading state consumer protection laws.²¹⁴ The federal Fair Debt Collection Practices Act (FDCPA) bans threats of criminal prosecution to collect

211. See *supra* notes 139–144 and accompanying text. Furthermore, the payday lender knew, or should have known, as a business licensed to operate in Missouri, that the payday loan statute banned the bad-check prosecution of consumers, like Ms. Shaw, who are unable to pay a loan where a post-dated check was used to obtain it. See VERNON'S ANN. MO. STATUTES § 408.505(8) (“A person does not commit the crime of passing a bad check pursuant to section 570.120 if at the time the payee accepts a check or similar sight order for the payment of money, he or she does so with the understanding that the payee will not present it for payment until later and the payee knows or has reason to believe that there are insufficient funds on deposit with the drawee at the time of acceptance.”); ERIC ZIEGENHORN, 7 MISSOURI PRACTICE SERIES, LEGAL FORMS § 33:30 (3d ed. & 2016 Update) (citing to § 408.505 and stating that “[r]eceiving a payday loan on the basis of a check for which sufficient funds are not present at the time of writing does not constitute the crime of passing a bad check”). The payday lender was, therefore, violating the spirit of this consumer protection provision by having consumers, like Wakita Shaw, arrested via civil contempt. Several states, either by statute or case law, protect payday loan customers from being prosecuted for passing a bad check. See, e.g., *infra* notes 255–262 and accompanying text.

212. See *supra* Part III.

213. Missouri courts have stated that they have the power to punish for contempt “but only if the judicial function is integrally threatened,” and that this power “should be used sparingly, wisely, temperately and with judicial self-restraint.” *Estate of Dothage v. Dothage*, 727 S.W.2d 925, 927 (Mo. Ct. App. 1987) (citing *McMilian v. Rennau*, 619 S.W.2d 848, 850 (Mo. Ct. App. 1981)). “The power should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice.” *Id.* Ms. Shaw’s failure to appear did not in any way threaten the Missouri court system or its administration of justice. Scholars and attorneys have provided several reasons why consumers fail to appear, and a primary reason is that they do not understand the document requiring their appearance and do not realize that being arrested is a consequence of failing to appear. See *Shepard*, *supra* note 148, at 1536. Moreover, they do not want to lose income by being forced to take a vacation day or unpaid time off from work. In short, the creditors know that the majority of consumers fail to answer a complaint and fail to appear in debt collection cases; creditors exploit that lack of response. See *supra* notes 135–138 and accompanying text. As a result, the civil contempt is being misused by payday lenders and others to perpetrate an injustice—the fast-tracking of payments of civil debts from consumers who believe they have been charged with a crime—all in violation of the state constitution.

214. Brief of Amicus Curiae Public Counsel in Support of Petitioners, *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 810 (2017) (No. 16-349), 2017 WL 818308 (describing how the debt collection industry has grown from collecting only 3 billion dollars per year in 1977 to collecting 750 billion annually and explaining how due, in part, to the growth in technology, states are even less effective in protecting their residents from unlawful collection activities than they were forty years ago).

a debt.²¹⁵ However, the FDCPA applies only to debt collectors,²¹⁶ not original creditors that collect their own debts.²¹⁷ That means, for example, Virginia Robinson could have sued the repo company, which was acting to collect a debt owed to another, for violating the FDCPA, but she could have not sued Fast Auto Loans for violating the FDCPA if it had chosen to collect its own debts directly.²¹⁸

Many states have consumer protection laws that, unlike the FDCPA, prohibit both creditors and debt collectors from engaging in unlawful collection practices, including threatening prosecution to collect debts.²¹⁹ For instance, the West Virginia Consumer Credit and Protection Act states that it applies to any company collecting debts.²²⁰ Courts have interpreted the act to explicitly apply to creditors collecting their own debts.²²¹ In the lawsuit against the FAL defendants mentioned in part II.A, the West Virginia Attorney General, relying on state law, obtained a settlement of FAL's numerous alleged violations, including threatening the arrests of consumers who fail to pay or relinquish possession of their vehicles.²²²

215. See *supra* note 200 and accompanying text. See, e.g., *Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 1185 (W.D. Wash. 2011) (holding that state law was preempted by the FDCPA's prohibition on threatening arrest and, thereby, upheld the FDCPA's purpose "to prevent debt collectors from making empty threats as a way to coerce payment from consumers"); *Liggins v. May Co.*, 373 N.E.2d 404 (Ohio Ct. Common Pleas 1977).

216. See 15 U.S.C. § 1692a(6) (2016).

217. *Id.* at § 1692a(6)(A).

218. See *supra* notes 25–61 and accompanying text (describing actions taken by a repo man to coerce Ms. Robinson into relinquishing ownership of her vehicle to Fast Auto Loans, the lender—original creditor—that had lent her money and obtained a security interest in her vehicle). Courts have held that the FDCPA applies to repo companies and prohibits them, for example, from using non-judicial actions to repossess a consumer's vehicle when there is no present right to repossess, such as when the consumer is not in default. See, e.g., *Buzzell v. Citizens Auto. Fin., Inc.*, 802 F. Supp. 2d 1014 (D. Minn. 2011); *Alexander v. Blackhawk Recovery and Investigation, L.L.C.*, 731 F. Supp. 2d 674 (E.D. Mich. 2010).

219. See *supra* note 200 and accompanying text.

220. See W. VA. CODE § 46A-2-122(d) (2013).

221. See, e.g., *Thomas v. Firestone Tire & Rubber Co.*, 266 S.E.2d 905, 909 (W. Va. 1980) ("[T]he plain meaning of W. Va. Code § 46A-2-122 requires that the provisions of article 2 of Chapter 46A regulating improper debt collection practices in consumer credit sales must be applied alike to all who engage in debt collection, be they professional debt collectors or creditors collecting their own debts."). Most courts interpreting state statutes that address unlawful debt collection practices have held that these statutes are applicable to both debt collection companies and original creditors. See 2 CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 675 (2016). See, e.g., *Liggins v. May Co.*, 373 N.E.2d 404, 406 (Ohio Ct. Common Pleas 1977) (holding that Ohio's Consumer Sales Practices Act applies to both creditors and debt collection companies attempting to collect consumer debts); *State ex rel. Fisher v. Lasson*, No. CV 92 10 0193, 1994 WL 912252 (Ohio Ct. Common Pleas 1994) (consent entry) (although defendants, the original creditors, did not admit to specific violations in a court-approved consent decree, the court made several conclusions of law, including that defendants committed unconscionable practices in violation of state law, when they threatened consumers with jail time for failing to pay membership fees).

222. WV's Second Amended Complaint, *supra* note 36, at 11. See also W. VA. CODE § 46A-2-124(b) (making an unlawful debt collection practice "[t]he accusation or threat to accuse any person of fraud, any crime, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule or contempt of society").

While West Virginia's residents benefitted from a favorable settlement obtained against the FAL defendants, many consumers reside in states where consumer protection laws do not apply to creditors collecting their own debts. As a result, creditors that criminalize consumers in those states regularly avoid liability.

Recent FTC and CFPB reports on debt collection practices make it clear that the practice of threatening consumers with arrest is a nation-wide problem.²²³ Companies that occasionally get caught may pay a fine, but that is not enough to deter criminalization practices. The occasional imposition of fines is simply factored into the company's operating cost under a profitable business practice. Federal and state enforcement actions demonstrate that creditors and debt collection companies are so successful in their criminalization practices that they frequently get consumers to pay phantom debts and other debts that are no longer lawful to collect.²²⁴

In summary, creditors should not be able to circumvent consumer protection laws and state constitutions via criminalization tactics. When creditors evade consumer protection laws and state constitutions, they make a mockery of each state's citizens, who, through the democratic process, have decided that individuals should not live in fear of imprisonment or be incarcerated for failing to pay civil debts.²²⁵

V

PROPOSED SOLUTIONS TO PROTECT CONSUMERS FROM CRIMINALIZATION PRACTICES

Lawmakers should enact legislation to deter criminalization practices because they inflict substantial harm on consumers and their families, the judicial system,

223. See *supra* note 14 and accompanying text. CONSUMER FIN. PROT. BUREAU, *supra* note 14, at 18 (reporting that among complaints by debt collectors to take illegal action, most of them are threats to "to arrest or jail consumers if they do not pay"). In addition to the high-cost lenders discussed in this article, creditors that issue traditional forms of consumer credit have been sued for allegedly collecting phantom debts. See, e.g., CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2016 (2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf [<https://perma.cc/EK8Q-ZVRP>] (discussing Chase's \$90 million settlement of an enforcement action filed by the CFPB alleging that Chase sold to debt buyers credit card accounts that included phantom debts, along with debts that were overstated or time-barred by the statute of limitations).

224. CFPB ANNUAL REPORT 2016, *supra* note 223. Consumers often succumb to abusive debt collection tactics by paying zombie debts, which are debts that are not legitimately owed, but have been transferred from the original creditor to a debt collector or debt buyer. See, e.g., Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M.L. REV. 327, 327–28 (2014) (stating that zombie debt may not be lawfully owed for several reasons, including that it has already been paid to the original creditor, it has expired under the statute of limitations, or it has been discharged in a consumer's bankruptcy case).

225. Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 355 (1995) ("[C]onstitutional theory presumes that citizens in a well-functioning constitutional democracy will upon reflection affirm fundamental constitutional values").

and society at large.²²⁶ A summary of the harm is followed by a discussion of plausible solutions.

Consumers subjected to criminalization tactics suffer financial, emotional, physical, and reputational harm.²²⁷ Consumers who are only threatened with arrest are at least emotionally harmed because, living in terror, they are robbed of their peace of mind and sometimes become physically ill.²²⁸ Consumers who comply with the creditor's demands are financially harmed when they relinquish ownership of personal property, pay unlawful fees and interests, or, tragically, pay phantom debts.²²⁹ Payday loan customers, credit card holders, student loan

226. See, e.g., *supra* note 121 and accompanying text (Wakita Shaw's mother borrowed money to get her out of jail, and then Ms. Shaw herself eventually filed bankruptcy); Johnson, *supra* note 7, at 11–12 (After getting arrested, Laquetta Hall borrowed money from someone else to pay off debt owed to a RTO company).

227. See, e.g., *supra* notes 70–106 and accompanying text (describing the criminalization tactics perpetrated by a RTO company against Janellen Edwards, who suffered financial harm by having to give up her furniture and extreme emotional distress after enduring repeated threatening phone calls from RTO dealer's employees who showed up at her home more than once). Patricia Haase lost ownership of her vehicle after a car title lender used the police to unlawfully repossess her vehicle. See Johnson, *supra* note 7, at 47–54 (describing how the car title lender's criminalization tactics amounted to financial abuse and stating that the lender was ordered to pay compensatory and punitive damages for its unlawful collection and repossession practices against Ms. Haase). Additionally, Christina McHan, after her payday lender filed a police report against her, was arrested and spent the night in jail. See, e.g., Wilder, *supra* note 2. Virginia Robinson was financially harmed when the FAL never gave her surplus funds in excess of the debt owed after repossessing and selling her car. See WV's Complaint, *supra* note 20, Exh. J. at 2. She suffered reputational and emotional harm as well when collectors came to her workplace and spoke about her indebtedness with her coworkers. *Id.*

228. See, e.g., Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at ¶ 20, ("Plaintiff [Janellen Edwards] suffered severe emotional distress as a result of the ongoing pattern of threats, intimidation and humiliation she endured as a result of TRS's conduct. She experienced migraine headaches, nausea, elevated heart rate, difficulty breathing, stabbing pains in her chest around her heart, loss of appetite, difficulty sleeping, upset stomach, severe anxiety, depression, and apprehension. She was humiliated by TRS's contacts with her co-workers, family, and associates."); Forrest Wilder, *Report: Texas Payday Lenders and Prosecutors Team Up to Criminally Pursue Borrowers*, TEX. OBSERVER (Dec. 17, 2014), <https://www.texasobserver.org/report-texas-payday-lenders-prosecutors-team-criminally-pursue-borrowers/> [<https://perma.cc/V72L-MM8B>] (After finding out a payday lender had filed a bad-check complaint against her, Margaret Jones, a seventy-one-year-old, whose income was from monthly social security checks, said: "I was just terrified to the point that I couldn't eat, my blood pressure went up . . . I was just nervous, scared.").

229. See, e.g., CFPB ANNUAL REPORT 2016, *supra* note 223 (reporting about several federal enforcement actions filed against companies engaged in unlawful debt collection practices, including coercing consumers into paying phantom debts); Johnson, *supra* note 7, at 28 (discussing an FTC lawsuit against a company that added unlawful fees, including up to \$200 in bogus legal fees, to payday loan debts and intimidated consumers into paying these grossly inflated debts by using threats of arrest); *Cash Advance Group - Payday Loan Debt Collection Scam*, WA DEP'T FIN. INSTITUTIONS (Feb. 14, 2017), <http://www.dfi.wa.gov/consumer/alerts/cash-advance-group-payday-loan-debt-collection-scam> [<https://perma.cc/FB9G-ADR2>] (warning from the Washington State Department of Financial Institutions about a group of entities operating a payday lending debt scam where some consumers fell prey to threats of arrests contained in fake arrest warrants attached to email messages sent to the consumers).

borrowers,²³⁰ RTO customers,²³¹ and car title borrowers have all been arrested as a result of actions initiated by creditors and have suffered immediate consequences, such as loss of employment.²³²

Besides the harm to individual consumers, taxpayer dollars subsidize the misappropriation of resources when law enforcement and prosecutors act as debt collectors and repo men for creditors.²³³ Janellen Edwards' prosecution ordeal, which transpired over several months, demonstrates this waste of law enforcement and judicial resources as result of TRS Home Furnishings' criminalization tactics.²³⁴ Moreover, creditors are shifting the costs of their

230. See, e.g., Abby Jackson, *7 Deputy US Marshals Reportedly Arrested a Guy Over a \$1,500 Student Loan He Took Out 29 Years Ago*, BUS. INSIDER (Feb. 16, 2016), <http://www.businessinsider.com/can-you-get-arrested-for-having-student-loan-debt-2016-2> [<https://perma.cc/4DPQ-B9AR>].

231. See, e.g., David Rosen, *5 Scams and Rackets That Can Turn You Into a 21st-Century Indentured Servant*, ALTERNET (July 2, 2014), <http://www.alternet.org/economy/americas-modern-debtors-prison> [<https://perma.cc/B7J8-D7AJ>] (identifying a RTO customer in Pottstown, Pennsylvania, who was arrested for “felony theft by deception, felony theft of leased property and felony receiving stolen property” after defaulting on payments for furniture and electronics obtained from a local Rent-A-Center store).

232. See, e.g., Hansen, *supra* note 3 (stating that Antonio Walker was fired after he was arrested over criminal charges stemming from debt involving RTO furniture even the charges were later dropped). Because employers, landlords, and other organization (both public and private) obtain full background checks on individual applicants for various reasons, arrest records routinely appear in databases even when individuals are never charged with or convicted of a crime. See Johnson, *supra* note 7, at 71 n.334. Such records are sometimes used to deny individuals employment, housing, licensing, and other services. *Id.* Because the criminalization tactics discussed in this article can lead to unlawful arrests that appear in background check databases, state lawmakers have another reason to pass laws penalizing creditors who engage in such tactics.

233. For example, instead of police officers going to Ms. Edwards' workplace to give her a citation over a dispute about the furniture, these limited law enforcement resources would have been better utilized investigating crimes, such as drug dealing and human trafficking, not acting as repo men for RTO companies. See Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at ¶ 18 (stating that a “TRS employee contacted the police, and caused a police officer to come to plaintiff's workplace”); See also *supra* notes 70–81 and accompanying text (explaining why TRS was found civilly liable for malicious prosecution and intentional infliction of emotional distress). Similarly, judges and prosecutors, who are already burdened with heavy criminal case loads, should be devoting taxpayer-funded resources to seeking justice for victims of actual crimes, not serving as debt collectors for RTO companies and payday lenders.

234. From the moment TRS employees filed a police report, which an officer later testified was based on false information supplied by TRS employees, law enforcement and judicial resources began to be wasted. See Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *supra* note 70, at ¶ 2. Ms. Edwards repeatedly appeared in court due to TRS's false allegations. Throughout this entire process, the judge had to oversee the hearings, the bailiff had to be present, and other members of the court, such as the stenographer, had to use resources to record the hearings that were based on lies about Ms. Edwards. Much time was taken to depose Ms. Edwards, TRS employees, and others. Additionally, Ms. Edwards testified that she eventually quit her job in real estate due to the events that occurred with TRS. *Id.* at 15–16. Due to the help of a criminal law attorney, the charges against her were dropped. However, the use of judicial resources did not end because she, rightly so, filed a civil lawsuit against TRS for its numerous violations of consumer protection laws. Two years later, Ms. Edwards won her civil case, which proved that TRS not only violated consumer protection laws, but also set in motion an ordeal that was a waste of both law enforcement and judicial resources. See Plaintiff's Memorandum in Opposition to Motion for JNOV and for New Trial, *supra* note 84, at 1 (stating “at the conclusion of the four day jury trial, plaintiff Janellen Edwards prevailed on all of her claims for relief”). All these resources were

improvident lending practices onto private citizens who use their money to bail consumers out of jail, and non-profit organizations that are compelled to aid consumers victimized by criminalization tactics.²³⁵ If consumers cannot borrow money from their relatives or friends, they are sometimes forced to use exempt income sources to pay off debts and seek out government-sponsored programs, such as food stamps, and non-profit organizations to help them survive.²³⁶

It is time for the United States to take serious steps to protect consumers from criminalization tactics. Along with urging that creditors be prosecuted for committing extortion, this article proposes several additional solutions, the first of which is to limit the use of civil contempt.

A. Bright Line Test To Limit Misuse Of Civil Contempt

Statutes that permit arrest warrants in civil contempt cases should be amended to limit when a creditor can even request a hearing to discover assets. This proposed amendment would then make it very unlikely that the creditor would be able to obtain an arrest warrant against a person sued for defaulting on a consumer loan.

Consider Illinois's recent attempt to limit when an arrest warrant can be issued. Even though the Illinois constitution generally bans incarceration of individuals over civil debts,²³⁷ creditors had been accused of regularly abusing the civil contempt process to have consumers arrested in violation of the constitution.²³⁸ In July of 2012, Governor Pat Quinn signed into law a bill, referred to as the Debtors' Rights Act.²³⁹ It requires, among other things, the creditor to personally serve the individual debtor with a Citation to Discover Assets along with an "Income and Asset Form."²⁴⁰ According to a press release

wasted simply because a rent-to-own company wanted to *quickly* get paid in full rather than file a civil lawsuit and take the long and lawful route to collect a civil debt.

235. See, e.g., *supra* note 121 (discussing Wakita Shaw, who stayed in jail until her mother could find someone to borrow from in order to pay the full bail amount to obtain Ms. Shaw's freedom).

236. See, e.g., Shepard, *supra* note 148, at 1536 (explaining why consumers may use exempted income sources to post bail to be released from jail); BRIAN T. MELZER ET AL., SPILLOVERS FROM COSTLY CREDIT 4 (U.S. Census Bureau Ctr. for Econ. Studies No. CES-WP-11, 2013), http://www.kellogg.northwestern.edu/faculty/melzer/Papers/Spillovers_from_Costly_Credit_04_11_2013.pdf (finding that families living in areas that have local access to payday loans were 20% more likely to use food stamps and confirming "that the effect of payday lending on food stamp receipt grows through time, as does payday loan availability"). See generally ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2014 4-8 (2015), <http://www.ers.usda.gov/media/1896841/err194.pdf> (reporting statistical data about the frequency of use of food pantries and soup kitchens by families experiencing food insecurity).

237. See ILL. CONST. art. I, § 14 ("No person shall be imprisoned for debt unless he refuses to deliver up his estate for the benefit of his creditors as provided by law or unless there is a strong presumption of fraud.").

238. See Greco & Hammer, *supra* note 131.

239. See Press Release, Ill. Att'y Gen. Lisa Madigan, Madigan: New Laws Ban Sending Debtors to Prison for Debts, Protect Consumers from High Costs of Refund Anticipation Loans (July 25, 2012), http://www.ag.state.il.us/pressroom/2012_07/20120725.html [<https://perma.cc/U7S9-S92W>].

240. See Public Act 97-0848; 735 ILCS 5/2-1402(a) (2014).

issued upon its passage, Illinois Attorney General Lisa Madigan proclaimed that it was time to end the “illegal abuses” of the judicial system by creditors who manipulate the court system to “extract money from the unemployed” and from those too poor to pay their debts.²⁴¹

Unfortunately, the act does not afford consumer debtors any free legal representation and takes for granted that consumers will understand the required notices and be able to complete the Income and Asset Form in a timely manner to prove which assets and income sources are exempt from attachment.²⁴² The Illinois law will most likely result in the arrest of consumers who fail to comply with all the law’s provisions, including the timely submission of the required form.²⁴³ Moreover, even if an arrest warrant is not issued, the entire discovery process will waste judicial resources in cases involving high-cost lenders, such as the ones described in this article.

Rather than putting the burden on consumers to comprehend legal documents and respond in a timely manner, lawmakers should implement a bright-line rule based on the loan’s initial APR and the consumer debtor’s income. If the creditor or debt collector is seeking to collect on a credit transaction with an effective APR at the time of origination of more than thirty-six percent, the creditor or debt collector should be denied any request for a hearing to discover assets unless it first demonstrates (from the consumer’s credit application or pay stub) that the consumer is an above-median-income debtor for his or her family size.²⁴⁴ This bright-line test would also include loan contracts

241. Greco & Hammer, *supra* note 131. Ms. Madigan stated that “the new law codifies and clarifies practices followed by attorneys, creditors and courts across Illinois to ensure that courts make a finding of a consumer’s ability to pay before entering a payment order, and it prohibits payment orders that rely on legally protected income and prevents arrest warrants from being issued unless the debtor was personally served with a hearing notice.” See Press Release, Ill. Att’y Gen. Lisa Madigan, *supra* note 239.

242. Greco & Hammer, *supra* note 131, at 136 (explaining that “the new legislation does not create any additional statutory exemptions; rather, it merely serves to highlight debtors’ rights to assert exemptions that have existed for years”).

243. Although I represented creditors during most of my private practice experience, I had the fortune to represent consumer debtors at Neighborhood Legal Services Association in Pittsburgh, Pennsylvania. Based on my experience, I do not believe the majority of consumer-debtors would be able to determine on their own all that is required under Illinois’ amended law to avoid civil contempt. Moreover, it is well-documented that the majority of consumers who qualify for legal aid representation are unable to actually receive pro bono service. KUEHNHOFF & CHING, *supra* note 135, at 1 (“Nationally, because of lack of resources, legal aid programs must turn away more than half of the eligible people who seek their assistance.”). As a result, it is fundamentally unfair to leave consumers who are likely to be in financial trouble to fend for themselves against highly experienced lawyers that represent creditors.

244. The author’s idea for relying on the debtor’s median income came from the Bankruptcy Abuse Prevention and Consumer Protection Act, enacted in 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005) [hereinafter BAPCPA]. See 11 U.S.C. § 707(b)(2)(A) (2006). For an overview of the means test, see U.S. Dept. of Justice, *Means Testing*, DOJ (Apr. 14, 2017), <https://www.justice.gov/ust/means-testing> [<https://perma.cc/DU3A-TTMV>] (the heart of BAPCPA is the means test, which is set forth in § 707(b)). See 151 Cong. Rec. S1726-01, S1779 (daily ed. Feb. 28, 2005) (statement of Sen. Arlen Specter). Instead of the pre-BAPCPA case-by-case analysis of a debtor’s ability to pay, Congress adopted the means test as a uniform mechanically-applied formula and intended that most above-median income debtors be required to file for Chapter 13 relief, not Chapter 7, and pay back

that have a default interest rate of thirty-six percent or higher, or a contract that allows the creditor to charge both a default interest rate and late charges. These contract terms would allow creditors to essentially get away with charging already-struggling consumers double the original loan principal.²⁴⁵

The justification for a bright-line test is based on documented financial data about consumers who rely on high-cost credit. Payday lenders, car title lenders, RTO dealers, and some installment lenders issue credit with effective APRs amounting to triple-digit, and sometimes quadruple-digit, interest rates.²⁴⁶ Plus their business models are founded on lending to consumers with no savings, lower incomes, and less assets.²⁴⁷ Therefore, it is fair to put the burden on creditors to prove a consumer debtor has above-median income before it can even request a hearing to discover assets.

some of their unsecured debts via a Chapter 13 plan. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 677–83 (2005). *See also* Wieland v. Thomas, 382 B.R. 793, 796, 798 (D. Kan. 2008) (The purpose of BAPCPA was to “ensure that debtors repay creditors the maximum they can afford,” and “[t]hat purpose is best achieved by applying the means test in such a manner that the debtor’s actual financial circumstances—i.e., what the debtor can actually afford to repay creditors—are represented”). The starting point of this uniform mechanically-applied formula is to first determine whether the debtor has an above-median income for his or her household size in the state where the household resides. *See* 11 U.S.C. § 707(b)(7)(A); *In re* Briscoe, 374 B.R. 1, 10 (Bankr. D.C. 2007) (“A presumption of abuse under the means test of § 707(b)(2) can only arise if the debtor is an above-median income debtor.”). Because Congress has already adopted the means test, which presumes the ability of above-median-income debtors to be capable of paying back the minimum amount of debt, the author’s proposal of a bright-line test is reasonable in that it would require a high-cost lender or debt collector to prove the consumer debtor has above-median income before seeking discovery against the consumer debtor.

245. Advocates and scholars have already determined that these and similar contract terms are predatory and need to be banned or curtailed. *See, e.g.,* Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 30–31 (2000) (explaining that “once a loan has been identified as a high-cost loan, the following limitations and prohibitions apply: a) the lender may not unilaterally accelerate the indebtedness, except upon default of the borrower; b) the loan may not contain any payment that is more than double the regular monthly payment, thus effectively preventing balloon payments; c) the loan may not provide for negative amortization; d) the interest rate may not be increased following default; e) the lender cannot require more than two payments to be paid in advance; f) no loan may be consummated unless the borrower receives approved housing counseling; g) no loan may be extended unless the lender ‘reasonably’ believes that the borrower will be able to repay the loan; h) financing of fees or charges payable to third parties is prohibited; i) a lender may not charge fees in connection with the refinancing of prior loans with the borrower; and j) payments to home improvement contractors must be jointly payable to the borrower or payable to a third-party escrow agent”). I am not arguing for a ban on default interest rates but that high-cost lenders with such terms should not be able to request oral hearings to discover assets unless they have independent evidence that the consumer has above-median income to justify invoking this post-judgment remedy.

246. *See, e.g.,* State *ex rel.* King v. B & B Investment Group, Inc., 329 P.3d 658, 670 (N.M. 2014) (holding that defendants’ so-called “signature loans” marketed in the State of New Mexico were unconscionable and holding that it “is grossly unreasonable and against public policy to offer installment loans at 1,147.14 to 1,500 percent interest [rates]”). *See also supra* notes 135–138 and accompanying text.

247. *See also supra* notes 139–143 and accompanying text (stating also that the consumer’s income is likely from a protected income source (for example, child support payments)).

Because creditors usually obtain proof of income (for example, copies of pay stubs) prior to credit approval,²⁴⁸ it would be easy for a creditor to determine whether a consumer debtor's household income is above the median.²⁴⁹ Once the creditor proves that the income is above the median, the court would then have concrete financial information that may indicate the debtor has the ability to pay. At that point, the creditor would be able to request that the debtor complete an asset/income form like the one required in Illinois. If that form indicates that the debtor has non-exempt income sources or unencumbered, non-exempt personal property, only then should the creditor be allowed to request a hearing for oral examination. Imposing these restrictions on creditors would prevent them from being able to abuse the civil contempt process as a pretext for getting arrest warrants and thereby limit their ability to waste judicial resources in cases involving exorbitantly priced consumer credit.

B. States Should Ban Payday Lenders From Attempting To Have Their Customers Arrested

Although the above proposed limitations on the use of civil contempt would apply to all high-cost lenders, payday lenders need additional restrictions placed on them to deter criminalization practices. The payday lending industry is rife with regulation-evading companies; therefore, payday lenders should be completely banned from seeking civil contempt orders against consumers or having them criminally prosecuted. Furthermore, if caught doing so, payday lenders should be held liable for actual and punitive damages. The proposed ban and monetary liability would apply to any company or debt buyer attempting to collect a payday loan debt.

248. See, e.g., *In re Marquardt*, 561 B.R. 715, 726 (Bankr. C.D. Ill. 2016) (holding that the consumer's payday loan debt would be discharged in his bankruptcy case, the court noted that because payday lenders, including Americash, "charge interest rates upwards of 400%," and "make these loans based on little more than proof of income," they "are almost never justified in relying on a debtor's assurances of repayment"); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 9 (2002) (explaining the payday loan process, which includes the customer providing proof of income); Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41, 62 (2012) (describing the results of a study of car title lenders in New Mexico and stating that most lenders require proof of an income source); Press Release, Rent-A-Center, New Campaign Promotes Credit-Free Alternatives (Nov. 24, 2008), http://media.corporate-ir.net/media_files/irol/90/90764/Rent-A-Center%20Press%20Release.pdf [<https://perma.cc/DG2U-GXHX>] (claiming to be free of credit checks, Rent-A-Center nevertheless requires that applicants offer proof of an income source).

249. Because the means test under BAPCPA requires a determination that the debtor's income is above the median income for his or her household size, see *supra* note 244 for further discussion, median income figures are readily available for a creditor to review. See 1 THE LAW OF DEBTORS AND CREDITORS § 10:13 (2016) ("The median family income numbers are taken from U.S. Census Bureau tables for each state, based upon the number of persons in the household. The Census Bureau regularly updates its tables, with an adjustment for cost of living increase based on the Consumer Price Index, and those tables for a current year are found at <http://www.usdoj.gov/ust/bapcpa>.").

Payday lenders should be singled out for several reasons. First, several states have passed laws in the last decade to curb payday loan borrowing.²⁵⁰ However, the payday loan industry has largely remained unaffected by these laws because of its ability to exploit loopholes.²⁵¹ In Ohio, for example, payday lenders have found a way to skirt an APR cap of twenty-eight percent and now charge interest rates higher than the triple-digit interest rates allowed under a pre-2008 law.²⁵²

Although the industry's trade association has taken the position that its members should not threaten or initiate criminal prosecution,²⁵³ this position appears to be mere window dressing, especially in light of the fact that state and

250. Despite states being characterized as either red or blue, the trend in the United States is for voters and lawmakers to favor limiting payday lending. For example, on the same day that the majority of South Dakota residents voted to elect Donald Trump as president, an even larger percentage of voters approved a law capping interest rates on payday and car title loans at 36%. See Ashlee Kieler, *South Dakotans Vote To Cap Payday, Auto-Title Loan Interest Rates At 36%*, *Consumerist*, CONSUMERIST (Nov. 9, 2016), <https://consumerist.com/2016/11/09/south-dakotans-vote-to-cap-payday-auto-title-loan-interest-rates-at-36/> [<https://perma.cc/4VT6-GXMB>] (stating that seventy-six percent voted for a ballot initiative capping interest rates). See also Timothy Goldsmith & Nathalie Martin, *Interest Rate Caps, State Legislation, and Public Opinion: Does The Law Reflect The Public's Desires?*, 89 CHI.-KENT L. REV. 115, 116–18 (2014) (discussing ballot initiatives in several states and stating that interest-rate caps on payday loans were approved by voters in the red states of Arizona and Montana).

251. See, e.g., *James v. National Financial, LLC*, 132 A.3d 799, 834 (Del. Ch. 2016) (holding that defendant's extremely high-cost loan was unconscionable and stating that "the most critical aspect of the bargaining environment was the purpose and effect of the Loan Agreement, which was to evade [Delaware's] Payday Loan Law").

252. In 2008, voters in Ohio overwhelmingly voted to ratify a state law reducing the then legalized interest rates on payday loans from 391% to 28%. See, e.g., *Payday Lenders Need a Firm Federal Hand and State Oversight*, CLEVELAND PLAIN DEALER (Sept. 2, 2016), 2016 WLNR 26826317. Payday lenders, however, simply exploited a never-before-used law to charge consumers interest rates as high as 718%. *Id.*; Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381, 396–27 (2012) (describing how payday lenders in several states, including Ohio, circumvent key provisions of newly enacted state laws and proposing that the CFPB ban certain payday-loan terms, including balloon payments and short maturity dates). In addition to evading state laws, payday lenders have been sanctioned for violating federal bankruptcy law by, among other things, violating the automatic stay, which is a temporary injunction that bars creditors from contacting debtors directly to get them to pay pre-bankruptcy debts. See, e.g., *In re Snowden*, 769 F.3d 651 (9th Cir. 2014) (upholding the bankruptcy court's imposition of punitive damages on a payday lender for willfully violating the automatic stay by several unlawful practices, including repeatedly calling the medical facility where the consumer debtor worked as nurse to get her to pay a pre-bankruptcy loan).

253. The Community Financial Services Association of America, the national trade association for the industry, has created for its members a list of "best practices," including the practice of members not pursuing criminal action against their borrowers. *CFSA Member Best Practices*, COMMUNITY FIN. SERVS. ASSOC. AM., <http://cfsaa.com/cfsa-member-best-practices.aspx#sthash.DZx2UiyP.dpu> [<https://perma.cc/JNK5-6EHE>] (last visited Aug. 4, 2016) (including a "No Criminal Action" practice, which states that "[a] member will not threaten or pursue criminal action against a customer as a result of the customer's check being returned unpaid or the customer's account not being paid"). However, it is clear that some lenders are not following this best practice. See, e.g., Catherine Dunn, *Group Warns of Debtors' Prison Tactics Among Texas Payday Lenders*, INT'L BUS. TIMES (Dec. 19, 2014), <http://www.ibtimes.com/group-warns-debtors-prison-tactics-among-texas-payday-lenders-1763720> (stating that over 1,500 criminal complaints have been filed by payday lenders in Texas alone).

federal enforcement actions prove criminalization practices are rampant among payday lenders and their debt-collection agents.²⁵⁴

In several states that authorize payday lending, a consumer cannot be prosecuted, at least in theory, based solely on the fact that the consumer's post-dated check was returned (or a debit authorization to the consumer's account was denied) due to insufficient funds.²⁵⁵ This protection was incorporated into some payday lending statutes because in the early days of payday lending consumers were being prosecuted for passing bad checks despite the fact that the payday lenders were not victims of a crime.²⁵⁶ To obtain a conviction for passing a bad check, the prosecution needs to show not only that the defendant gave the payee a check knowing his or her account had insufficient funds, but that the payee also lacked knowledge that the account had insufficient funds.²⁵⁷ Payday lenders, as payees on post-dated checks, are not victims of a crime because they know at the time a consumer applies for loan approval that the consumer's account lacks sufficient funds.²⁵⁸ Therefore, the lender only has a civil claim for breach of contract. No consumer should be prosecuted under those circumstances.

Consider again Wakita Shaw's case, where the payday lender knew, or should have known, as a business licensed to operate in Missouri, that the payday loan statute banned the bad-check prosecution of consumers unable to pay loans obtained with post-dated checks.²⁵⁹ The payday lender was, however, violating the spirit of this consumer protection provision by misusing civil contempt to have consumers like Wakita Shaw arrested.

Similarly, when Cash Biz and other payday lenders in Texas filed criminal charges against hundreds of consumers who had defaulted on their loans, the lenders knew, or should have known, that the Texas constitution prohibits incarceration of individuals over debts, and that a state regulation provides that

254. See *infra* notes 260–263 and accompanying text. When payday lending started in the late 1990s, consumer-borrowers had to give lenders post-dated checks in order to obtain loans. Johnson, *Payday Loans*, *supra* 248, at 71. If the consumer's check bounced due to insufficient funds, payday lenders often filed criminal complaints that accused consumers of the crime of passing a bad check. *Id.* Even though many lenders no longer require a physical post-dated check, those that practice criminalization practices will nevertheless accuse the customer of passing a bad check if the attempted debit to the customer's account is denied due to insufficient funds. See, e.g., Johnson, *supra* note 7.

255. See, e.g., Johnson, *supra* note 7, at 42–47 (discussing the criminalization tactics of Goldman Schwartz, a company that was a debt collector for several payday lenders, including Ace Cash Express, the nation's second largest payday lender).

256. *Id.* at 16.

257. *Id.* See, e.g., *Turner v. E-Z Check Cashing of Cookeville, Tenn., Inc.*, 35 F. Supp. 2d 1042, 1051 (M.D. Tenn. 1999) (“Tennessee law forbids prosecution of a person who issues a check which ‘the payee or holder knows or has good and sufficient reason to believe the drawer did not have sufficient funds on deposit to the drawer’s credit with the drawee to ensure payment.’”).

258. *Turner*, 35 F. Supp. 2d at 1051 (holding that “it is reasonable, logical, and predictable” that the payday lender knows the consumer-borrower’s account has insufficient funds to cover the check and, therefore, the lender is not the victim of a crime).

259. See VERNON’S ANN. MO. STAT. § 408.505(8); *infra* notes 260–262 and accompanying text.

the lenders should only pursue prosecution when they have specific evidence of a consumer committing forgery, fraud, theft, or some other criminal conduct.²⁶⁰ This imputed knowledge is why the Texas Office of the Consumer Credit Commissioner fined Cash Biz²⁶¹ and issued a bulletin warning all payday lenders operating in Texas not to pursue criminal prosecution of consumers unless they had specific evidence of forgery or other intentional unlawful conduct proving the consumer's guilt beyond a reasonable doubt.²⁶²

Even ACE Cash Express, the nation's second largest payday lender, has been sued for alleged criminalization practices. In 2014, ACE agreed to pay \$10 million to settle with the CFPB a lawsuit alleging numerous violations, including allegations that ACE's own employees and third-party debt collectors repeatedly threatened consumers with criminal prosecution.²⁶³ Given the industry's track record of ignoring state and federal laws, payday lenders must be completely barred from initiating criminal charges of any kind against consumers.

In addition to completely banning payday lenders from filing police reports or criminal complaints, substantial liability should be imposed on lenders that attempt to file criminal charges as well as on lenders that only threaten to do so. Lenders found to have engaged in a pattern of criminalization practices should be required to pay treble damages to each victim and should be subject to punitive damages starting at \$10,000 for each person victimized.²⁶⁴ Consumers

260. TEX. CONST. art. 1, § 18 (“No person shall ever be imprisoned for debt.”). The Texas Finance Code states: “a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct.” TEX. FIN. CODE § 393.201(c)(3) (2012). *See also* TEX. FIN. CODE ANN. § 392.301(a) (West 2006) (“In debt collection, a debt collector may not use threats, coercion or attempts to coerce that employ any of the following practices ... [including] accusing falsely or threatening to accuse falsely a person of fraud or any other crime.”).

261. Agreed Order, In Matter of Cash Zone LLC d/b/a Cash Biz, (Dec. 15, 2014) (No. L15-048) (imposing a fine of \$10,000 and ordering Cash Biz provide restitution to all consumers against whom it had filed criminal complaints).

262. TEX. OFFICE OF CONSUMER CREDIT COMM’R, CREDIT ACCESS BUSINESS ADVISORY BULLETIN, FILING CRIMINAL CHARGES AGAINST CONSUMERS, (2013), <http://occc.texas.gov/sites/default/files/uploads/disclosures/b13-9-cab-criminal-charges.pdf> [<https://perma.cc/WT2J-B3A9>]. In Texas, payday lenders are registered to operate as credit access businesses (CABs). The Bulletin warned payday lenders or CABs that a post-dated check or debit authorization alone cannot be the basis for prosecution and that lenders should not pursue prosecution of consumers “unless it has specific evidence” of forgery, fraud, theft, or other criminal conduct. *Id.* (“Before threatening or pursuing a criminal charge, a CAB should have specific evidence that the state can use to prove—beyond a reasonable doubt—that a consumer knowingly violated a criminal law when entering the transaction.”).

263. Consent Order, In the Matter of ACE Cash Express, Inc., No. 2014-CFPB-0008, 2014 WL 4472891 (July 10, 2014); Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action Against ACE Case Express for Pushing Payday Borrowers Into a Cycle of Debt (July 10, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/> [<https://perma.cc/HA6K-E7LX>] (uncovering a diagram in ACE's training manual that the CFPB alleges was used to trap consumers in a cycle of indebtedness).

264. Starting with a punitive damages award at \$10,000 seems fair given that consumers in a successful litigation can obtain that amount under applicable laws. Several federal and state statutes limit the amount of punitive damages in a single lawsuit. *See, e.g.*, 15 U.S.C. § 1691e(b) (Equal Credit Opportunity Act) (“Any creditor, . . . who fails to comply with any requirement imposed under this subchapter shall

who prevail against lenders should also be allowed to recover the cost of reasonable attorneys' fees.

Finally, mandatory arbitration and class-action waiver clauses in payday loan contracts should be declared unenforceable by lenders that engage in criminalization practices. Cash Biz is the poster child for why these clauses should be unenforceable. After a class-action lawsuit was filed against it for numerous state law violations, including filing over 400 criminal complaints against its customers, Cash Biz invoked its contractual arbitration clauses and class-action waiver provisions to avoid being held civilly liable on a large scale.²⁶⁵ A payday lender's duplicitous conduct—using the criminal justice system to accuse its customers of crimes and then fighting to keep those same customers out of civil court—should be disallowed to deter the lender from using criminalization tactics.

In light of the industry's ability to earn billions by ignoring state laws passed to end the payday loan debt cycle,²⁶⁶ no reason exists for payday lenders to cease using criminalization tactics on their own. In short, the above-proposed measures should make the cost of doing wrong increase to the degree that payday lenders are motivated to do right by complying with applicable laws. Passage of a multifaceted solution is necessary to protect consumers from payday lenders that engage in criminalization practices.

be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor.”); CAL. CIV. CODE § 1787.3 (capping punitive damages at \$10,000).

265. Despite the fact that Texas already has a law applicable to payday lenders that severely limits when a consumer can be prosecuted for passing a bad check, Cash Biz filed criminal complaints lacking any legal grounds for prosecution against hundreds of consumers. *See supra* notes 260–262 and accompanying text. The state regulator imposed on Cash Biz a \$10,000 fine and a restitution order. *See supra* notes 260–262 and accompanying text. With such a small fine, it is reasonable to conclude that Cash Biz's profits exceeded the fine imposed. Why is that so? Because this company had developed a reputation for seeking criminal prosecution, some consumers who received only verbal threats from Cash Biz would have paid outstanding loans, even in amounts exceeding what they owed. After being sued for its criminalization tactics in a class action lawsuit, Cash Biz defended on the basis that the consumers had to arbitrate individually due to mandatory arbitration and class-action waiver provisions in their loan contracts. *See Cash Biz, LP v. Henry*, No. 04–15–00469–CV, 2016 WL 4013794, at *1, 8 (Tex. App.–San Antonio July 27, 2016). The majority of the appellate court ruled in Cash Biz's favor, thereby compelling consumers to arbitrate in individual cases. *But see id.* at 8 (Martinez, J., dissenting) (disagreeing with the majority and stating that Cash Biz did sufficiently invoke the judicial process, and thereby waived its right to arbitration, because “[b]y submitting the sworn complaints, Cash Biz not only procured the prosecution, it became a ‘witness’ in the criminal prosecution, i.e., a person who presented personal knowledge of the borrowers’ purported criminal conduct”).

266. *See, e.g.*, Policy Brief, Center for Responsible Lending, Payday and Car Title Lenders Drain \$8 Billion in Fees (Jan. 2017), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_statebystate_fee_drain_may2016_0.pdf (providing examples of payday lenders evading state laws that cap interest rates on payday loans and explaining how lenders profit primarily from consumers trapped in long-term debt, even though payday loans are marketed as short-term loans).

C. Statutes That RTO Lenders Use To Have Consumers Arrested Should Be Decriminalized

Along with curbing the criminalization practices of payday lenders, state lawmakers must also stop the criminalization practices of RTO companies. The RTO industry has, over the years, lobbied for passage of laws expanding the definition of theft crimes to include fraudulent leasing of and failing to return RTO property.²⁶⁷ These laws criminalize consumers who have defaulted on their payments by making typical breach-of-contract behavior a crime.²⁶⁸ When law enforcement and prosecutors do not actually understand the required *mens rea*, consumers will be wrongfully arrested, prosecuted, and, sometimes, convicted for simply breaching a contract.²⁶⁹ Thus, it is imperative that state lawmakers repeal criminal statutes currently exploited by RTO companies to have customers arrested.

Consider, as an example, a bill supported by RTO dealers and debated before the Connecticut General Assembly. In 2006, RTO dealers in Connecticut tried to expand a state law to criminalize customers who failed to pay their outstanding debts.²⁷⁰ The assembly accepted testimony from RTO dealers.²⁷¹ One dealer, Mr. Brett Lagasse, testified that the law was necessary to curb losses to RTO businesses and raised the ancillary issue of loss of tax revenue from customers.²⁷² His testimony further implied that the proposed law would be used against customers who have failed to pay for items rented only for commercial use, not for personal or household use.²⁷³

267. See, e.g., Johnson, *supra* note 7, at 57–58 (describing how RTO dealers in Florida lobbied state lawmakers to expand the scope of a criminal statute that makes it a crime to fail to turn over possession of RTO property).

268. *Id.* MultiState Associates is a firm of lobbyists that seeks passage of industry-friendly laws. See *Services*, MULTISTATE ASSOCIATES, <https://www.multistate.com/content/services> [https://perma.cc/9P7A-VWK8] (last visited June 26, 2016). It has compiled a fifty-state survey of theft-related crimes for the American Rental Association. See also MULTISTATE ASSOCS., *THEFT OF RENTAL SERVICES 50-STATE SURVEY* (2007), https://www.bipac.net/ararental/Theft_of_Rental_Services.pdf [https://perma.cc/A9W3-Z6BK].

269. See, e.g., *Bert v. Commonwealth*, No. 1499–10–1, 2011 WL 4916203, at *3 (Va. Ct. App. Oct. 18, 2011) (holding that intent to defraud “cannot be proved beyond a reasonable doubt by [the Commonwealth] merely showing that appellant failed to honor the terms of her lease agreement” and reversing appellant’s conviction for failing to return a television); *State v. Sanders*, 905 So. 2d 241, 242–43 (Fla. Dist. Ct. App. 2005) (holding that the prosecution could not prove guilt beyond a reasonable doubt merely by showing that the RTO customer failed to return RTO property after the company sent her a certified letter demanding its return).

270. *Hearing on H.B. 5611 Before the Gen. Assemb. Judiciary Comm.* (Conn. Mar. 14, 2006), transcript available at <https://www.cga.ct.gov/2006/juddata/chr/2006JUD00314-R001000-CHR.htm> [https://perma.cc/A72L-YXR7].

271. *Id.* (“I offer an experience of frustration of being powerless to collect legitimate rental fees from customers who fail to return my rental equipment on time. Each year I lose approximately ten to fifteen thousand dollars in revenue due to these uncollectible late charges. And of course, as a result, the State of Connecticut also loses its share of that revenue through its lost sales tax.”).

272. *Id.*

273. *Id.* (suggesting that his company provides a “valuable service to the public by offering equipment

Contradicting Mr. Legasse's characterization of the proposed bill, Raphael Podolsky, a legal aid attorney with the Legal Assistance Resource Center of Connecticut, testified that law could be used to impose criminal liability on all customers, not just those renting for commercial purposes.²⁷⁴ He asserted that the real purpose²⁷⁵ of the proposed law was to intimidate customers into paying through fear of arrests:

House Bill 5611 . . . is about people who have returned [RTO] goods, but they owe something . . . [T]he purpose of the bill is to make it possible to threaten them with arrest or to actually arrest people. You should note that it applies to all leasing of goods . . . This includes when you go to the video store and rent a video, it includes a computer rental, a musical instrument rental, whatever it is . . . It does have the capacity to turn the police into bill collectors. The reality is that this is no different from any other kind of bill. We do not allow people to be arrested because they are behind on a bill. And there is no reason to be carving out a special exception for this industry.²⁷⁶

Apparently, persuaded by Mr. Podolsky and other consumer advocates, the Connecticut General Assembly passed a version of the bill, later enacted, that exempts from prosecution individuals who enter into rental agreements for "personal, family or household purposes."²⁷⁷

Similarly, consumer advocates in Virginia have successfully stopped the prosecution of consumers for failing to return RTO goods.²⁷⁸ After arrests for failing to return RTO property soared in Virginia,²⁷⁹ consumer advocates initially made unsuccessful attempts to get politicians to repeal the Virginia statute that made it a crime for a customer to fail to return rental property within ten days of

for construction, corporate meetings, weddings, parties, a limitless number of situations and items").

274. *Id.*

275. Mr. Podolsky was not exaggerating when he stated that a person could be arrested for failing to pay for something as small as a video rental. For instance, in South Carolina, a state that also has a law criminalizing the failure to return rental property, a woman was arrested after failing to pay rental fees at a video rental store. Philip Bantz, 'Monster-In-Law' VHS Arrest a PR Nightmare For Pickens County, N.C. LAW. WEEKLY (Feb. 20, 2014), <http://nclawyersweekly.com/2014/02/20/monster-in-law-vhs-arrest-a-pr-nightmare-for-pickens-county/> [<https://perma.cc/35BM-S5PC>]. For some reason not revealed to the public, the sheriff decided to run Ms. Finley's name through a criminal database and discovered an outstanding warrant for her arrest for failing to return a VHS videotape of "Monster-In-Law," which she had rented nine years earlier. *Id.* He arrested Ms. Finley on the spot even though the video rental store had been closed for a few years. *Id.* Ms. Finley spent the night in jail and was released the next day on a \$2,000 personal recognizance bond. *Id.* When TMZ caught wind of the story and reported it, the news story went viral and the sheriff's office received enormous negative media attention. *Id.* The owner of the defunct store also heard about it and asked that the charges against Ms. Finley be dropped. *Id.* This movie could not have been worth more than \$20 at the time she rented it, yet she was charged with a crime that carried a maximum fine \$1,000 or 30 days in jail. *Id.*

276. *Hearing on H.B. 5611, supra* note 270.

277. See CONN. GEN. STATUTES ANN. § 53a-126b (defining "criminal trover in the second degree").

278. See *infra* notes 280-283 and accompanying text.

279. See, e.g., Heather Sullivan, *Convictions rise for merchandise renters who default*, LIVE 5 NEWS (2011), <http://www.live5news.com/story/15961694/convictions-rise-for-merchandise-renters-who-default> [<https://perma.cc/ENR8-XMPL>] (stating that the number of convictions rose from thirty-three in 2008 to fifty-three in 2010). For example, Antonio Walker, mentioned in the introduction, lost his job after he was arrested for allegedly failing to return RTO property. Hansen, *supra* note 3.

the owner making a demand for its return.²⁸⁰ Then, in 2014, a businessman sought to make the law even more punitive by expanding the criminal penalties for failing to return RTO property. Consumer advocates, seeing this as the chance to push for stronger protection of RTO consumers, struck a compromise that gave the businessman what he wanted²⁸¹ but that resulted in an amended statute that exempts consumers who sign RTO contracts from prosecution.²⁸² Consumer advocates then started a campaign to educate prosecutors and public defenders about the change in the law.²⁸³ As a result, honest RTO customers who initially make RTO payments but later suffer a financial setback no longer need to fear prosecution in Virginia.

Unfortunately, most states still have theft statutes that RTO companies can rely on to unlawfully terrorize consumers with threats of arrest or to unlawfully initiate criminal action to have them arrested.²⁸⁴ State lawmakers, therefore, need to amend theft statutes related to RTO property and exclude from prosecution consumers who enter into RTO contracts for personal, family, or household use.

280. In 2013, advocates succeeded only in getting lawmakers to expand the time period to return RTO property from ten to thirty days. *See* VA. CODE ANN. § 18.2-118 (West 2013) (amended by Act of Mar. 3, 2014, ch. 56, 2014 Va. Acts 100).

281. *See* VA. CODE ANN. § 18.2-118(D). Subsection D is the provision that the businessman wanted to add to the statute, and it reads as follows:

D. The court shall order a person found guilty of an offense under this section to make restitution as the court deems appropriate to the lessor. Such restitution may include (i) the cost of repairing such property; (ii) if the property is not returned or cannot reasonably be repaired, the actual value of such property; and (iii) any reasonable loss of revenue by the lessor resulting from the fraudulent conversion or removal of such property.

282. *See* VA. CODE ANN. § 18.2-118(A) (2014). It now reads as follows:

A. Whenever any person is in possession or control of any personal property, by virtue of or subject to a written lease of such property, except property described in § 18.2-117 or in the Virginia Lease-Purchase Agreement Act (§ 59.1-207.17 et seq.), and such person so in possession or control shall, with intent to defraud, sell, secrete, or destroy the property, or dispose of the property for his own use, or fraudulently remove the same from the Commonwealth without the written consent of the lessor thereof, or fail to return such property to the lessor thereof within 30 days after expiration of the lease or rental period for such property stated in such written lease, he shall be deemed guilty of the larceny thereof.

(emphasis added in underline).

283. *See, e.g., Jeremy P. White Is Legal Aid Award Recipient*, VA. STATE BAR (Apr. 30, 2015), http://m.vsb.org/site/news/item/white_legal_aid_award_0415 [<https://perma.cc/4LED-2DTF>] (announcing that Attorney Jeremy White, who also trains other attorneys, was honored for his various legal activities, including working with the Virginia Legal Aid Society and lawyers with the Virginia Poverty Law Center to obtain “a repeal of the Virginia Code section that permitted owners of rent-to-own furniture stores to criminally charge customers who fell behind on their payments”); *Rent-To-Own Stores Can No Longer Use Prosecutors as their Debt Collectors*, VA. POVERTY L. CTR. (July 9, 2014), <http://www.vplc.org/rent-to-own-stores-can-no-longer-use-prosecutors-as-their-debt-collectors> [<https://perma.cc/NY8B-4ZBS>] (educating the public that RTO customers can no longer be prosecuted for failing to return RTO property).

284. *See also supra* notes 70–81 and accompanying text (describing how a RTO customer in Oregon was unlawfully arrested and charged with a crime after the RTO company’s employees falsely represented that she refused to make any payments). *See also* THEFT OF RENTAL SERVICES 50-STATE SURVEY, *supra* note 268.

Moreover, consumer protection laws need to be amended to severely penalize RTO companies that resort to criminalization tactics.²⁸⁵

VI CONCLUSION

Whether lenders engage in criminalization tactics that actually initiate criminal prosecution or merely threaten to do so, they have every incentive to continue such practices, especially when they are successful in getting consumers to relinquish ownership of assets or to pay phantom debts or amounts far in excess of what they owe. Similar to consumers subjected to criminal prosecution, consumers who are victimized by a creditor's misuse of civil contempt are in a legally precarious situation. Like Ms. Shaw, they are sitting in jail without the ability to get a court-appointed attorney and must post the full amount of the required bail to be released from jail.²⁸⁶

Lawmakers will do a great service to vulnerable consumers by implementing the above-proposed solutions to deter payday lenders, car title lenders, debt collection companies, and any other creditors from employing criminalization tactics against consumers. Although the proposal did not cover every type of high-cost lender that resorts to criminalization tactics, state lawmakers could adopt some of the proposed solutions by imposing stiff financial penalties on such lenders²⁸⁷ and decriminalizing theft-related statutes,²⁸⁸ thereby preventing state laws from being used to arrest or prosecute consumers.

Until state legislatures decide to act, it is imperative that state and local law enforcement pursue prosecution of creditors for extortion. Rather than blaming consumers for their predicaments,²⁸⁹ prosecutors should focus on the culpability

285. The same proposed liability recommended for deterring payday lenders should also be implemented against RTO companies that engage in criminalization practices. *See supra* notes 267–269 and accompanying text (proposing that lawmakers require courts to impose treble and punitive damages against payday lenders and make their arbitration and class-action waiver clauses unenforceable).

286. *See, e.g., supra* notes 114–33 (describing how a payday lender's use of civil contempt led to the arrest of Ms. Shaw, who stayed in jail until her mother could find someone to borrow money from in order to pay the full bail amount to obtain Ms. Shaw's release from jail).

287. *See, e.g., supra* note 264 and accompanying text (proposing that if a payday lender is found liable for threatening or initiating criminal prosecution against a consumer, the lender should be liable for treble and punitive damages, along with attorneys' fees).

288. *See, e.g., supra* notes 276–282 and accompanying text (explaining how consumer advocates in Connecticut and Virginia were able to get legislation passed exempting RTO customers from criminal prosecution if the RTO property is obtained for personal, family or household use).

289. The United States has a culture of blaming victims in numerous contexts. *See generally* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006). The rape victim was "asking for it" because she was wearing provocative clothing. *See, e.g.,* Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87 (1995). *See also* Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable Clark v. Arizona*, 58 CASE W. RES. L. REV. 19, 28 (2007) (Victim blaming is not intended to be cruel but is a way of protecting oneself from feeling vulnerable: "Rather than feeling vulnerable, we prefer to imagine that the victim is to blame.").

of the alleged extortionists and prosecute when evidence reveals guilt beyond a reasonable doubt.²⁹⁰ Such prosecutions vindicate consumers and simultaneously send the message that extortion is not a lawful way to collect debts from consumers even if they are validly owed.²⁹¹

Poor, nameless consumers deserve to be protected from extortion just as much as rich, famous victims like David Letterman. He could meet with prosecutors in New York and know that he would not hear: “you got what you deserve for cheating on your wife.”²⁹² Robert Halderman was investigated for and charged with attempted larceny by extortion because he demanded \$2 million from Letterman in exchange for not revealing Letterman’s past sexual relationships with female staffers.²⁹³ Letterman could have easily paid the money demanded, but he chose not. Moreover, he had the financial resources to hire the best lawyers to advise him on the best course of action.

Unlike David Letterman, vulnerable consumers and their families usually cannot afford an attorney, and they are coerced into complying with creditors’ demands, thereby suffering great financial harm.²⁹⁴ When a consumer victimized by criminalization practices makes a payment, it does not prove the legitimacy of the debt owed or that the consumer had the means to pay all along.²⁹⁵ To the contrary, payment only proves that the creditor perceived the consumer’s vulnerability and exploited it by threatening criminal prosecution or exposure of the consumer’s indebtedness. The consumer’s vulnerability, coupled with a desperation to avoid going to or to get out of jail, means the consumer will comply with the creditors demand by relinquishing possession of their assets and paying off the debt, sometimes using exempted funds or money borrowed from others.

Instead of blaming the victims, we should collectively agree with the district attorney’s public pronouncement promoting equal treatment: “New York City will not tolerate the coercion or extortion of anyone, be the victim rich or poor, famous or anonymous. The law prohibits conduct like defendant’s and attaches severe penalties to it. We intend to enforce the law.”²⁹⁶ It is time to enforce the

290. See, e.g., *supra* notes 20–34 (describing a compelling example of extortion based on an explicit threat where a repo man handed a consumer a written document stating that she would be arrested and quoting an entire section of the criminal code she purportedly violated by not relinquishing possession of her car to the repo man).

291. *People v. Fichtner*, 118 N.Y.S.2d 392 (N.Y. App. Div. 1952).

292. See Alicia Maxey Greene, *News Release*, N.Y. CTY. DIST. ATT’Y’S OFF. (Oct. 2, 2009), <https://web.archive.org/web/20091005175911/http://manhattanda.org/whatsnew/press/2009-10-2.shtml> [https://perma.cc/37NF-DZLB].

293. *Id.*

294. See, e.g., *supra* notes 152–156 and accompanying text (stating that a payday loan borrower, Wakita Shaw, had to borrow money to get her out of jail, and then, a few months later, Ms. Shaw herself filed bankruptcy).

295. See, e.g., *supra* notes 152–156 and accompanying text; Johnson, *supra* note 7 (describing several examples of consumers who paid phantom payday loan debts because the debt collection companies used the consumers’ sensitive information (for example, social security numbers) to convince them that they owed the debts and that they would be immediately arrested if they failed to pay).

296. *Id.* (statement by Manhattan District Attorney Robert Morgenthau).

law against creditors that use criminalization tactics to terrorize consumers into paying civil debts or relinquishing their assets.